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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 444

STANLEY J. ORLOFF, PETITIONER,

vs.

COLONEL REX E. WILLOUGHBY, COMMANDANT OF FORT LAWTON, SEATTLE, WASHINGTON

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petition for certiorari Filed July 14, 1952

Certiorari granted November 10, 1952

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

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1 IN UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

No. 2951

United States of America, on the Relation of
STANLEY J. ORLOFF, *Petitioner*

v.

REX E. WILLOUGHBY, and C. P. LINES, *Respondents*

Petition for Writ of Habeas Corpus

TO THE HONORABLE THE JUDGE OF THE U. S. DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION:

The petition of Stanley J. Orloff, by and through his attorneys, the undersigned, respectfully shows as follows:

1.

Petitioner is now held in custody and in restraint of his liberty by color of the authority of the United States, and he is presently detained by the United States Army at Fort Lawton, in Seattle, King County, Washington, within the Western District of Washington, Northern Division.

2.

Petitioner is so held in restraint pursuant to a purported induction into the United States authority assertedly under the authority of Public Law 779, 81st Congress (titled 48 USCA, Section 454 (1) (i)), and has so been held in restraint and so detained since July 26, 1951.

2 3.

The jurisdiction of this Court arises under Section 2241, Title 28, United States Code, in that petitioner is in custody under and by color of the authority of the United States, and he is in custody contrary to law.

4.

Respondent Rex E. Willoughby is a Colonel of the United States Army, and is the commanding officer of Fort Lawton, and the person exercising general authority over said fort and over the person of petitioner herein; and respondent C. P. Lines is a Captain in the United States Army, and the commanding officer of the

Casual Enlisted Section, Fort Lawton Personnel Center, Seattle, Washington, and is the person exercising direct and immediate custody over, and control of, petitioner.

5.

Petitioner is a medical doctor, duly and regularly admitted to the practice of medicine in New York State, and having actually engaged in the practice of medicine as a doctor for the New York Department of Mental Hygiene, for the past four years, as a psychiatrist; and at the time of his induction above stated, was a Senior Psychiatrist. Petitioner is a graduate of the Tulane University School of Medicine. Petitioner is 27 years of age, having been born April 5, 1924, and is married and has a wife and two children dependent upon him.

6.

Petitioner is not now and has not at any time since the date of his induction into the United States Army above
3 stated been subject to any part of the Selective Service Law of the United States, title 50 App. U. S. C. 454 (a), excepting only Section 454 (i), (1), providing for the induction of medical doctors and others for service as medical doctors and other urgently needed specialists, and said provision of law permits and authorizes the induction of medical doctors for service in the United States Army only as medical doctors.

7.

The regulations and practice of the United States Army provide that an individual can serve as a doctor of medicine in the United States Army only if he holds a rank as a commissioned officer.

8.

Petitioner is detained in the United States Army as a private, and is not engaged in service as a medical doctor. Prior to his induction in the United States Army, petitioner applied for a commission in the United States Army as a medical doctor. Following his induction into the United States Army, he again applied for a commission as a medical doctor, and such commission has not been issued to petitioner, and he continues to be held and detained in the United States Army as a private, contrary to the provisions of law above referred to. He has been informed by the respondents, through their subordinates, that he will not be permitted to serve as a doctor of medicine unless he first receives an appointment as a commissioned officer.

9.

Although petitioner has been in the United States Army from July 26, 1951, to the present, at no time during this period has he been employed or permitted to work as a doctor of medicine. He has requested an opportunity to work as a doctor of medicine with or without a commission, but this request has been denied.

10.

The petitioner has requested of the respondents that, in view of their refusal to permit him to serve as a doctor in the armed forces, the sole purpose for which he was drafted, they discharged him from the Army. This has also been denied.

11.

By reason of the matters and things above set forth, petitioner unlawfully restrained of his liberty and held in custody is subject to immediate shipment to the Far Eastern Command; and unless respondents are immediately restrained and enjoined therefrom, petitioner will be removed from the jurisdiction of this Court and delivered beyond the seas; and such action is immediately threatened and will take place, except as for the intervention of this Court within the next few days.

WHEREFORE PETITIONER PRAYS:

That this Court proceed in a summary way to determine the facts in this case and the legality of the present detention of petitioner as a private in the United States Army under the custody and control of respondents herein; and that upon summary determination of such facts, that respondents Rex E. Willoughby and C. P. Lines, or such other person or persons as may be detaining petitioner, forthwith do relieve petitioner from such unlawful detention; and that, to that end, the Court issue its writ of habeas corpus, directing such persons forthwith to bring the body of Stanley J. Orloff before this Court, and thereupon to release him from unlawful detention and restraint of his liberties; or, in the alternative, to show cause, if any there be, why said petitioner should not be released and restored to his liberty.

IN UNITED STATES DISTRICT COURT

Order to Show Cause—Dec. 31, 1951

This matter having come on before the undersigned Judge of the above entitled Court, in open court, on the petition of Stanley

Director of the Creedmoor Institute for Psychobiologic Studies, because of the importance of the research project in which I was then engaged.

3.

Upon my induction into the Army of the United States and until I received by PMOS, I had both requested, and expected to be assigned for work as a doctor. While I was waiting for
19 medical specialty assignment, I made specific request of Col. Warren Diessner and Col. Rawley Chambers, Brooke Army Medical Center, Fort Sam Houston, Texas, to be given work as a doctor, regardless of my grade or rank. These requests were referred by Col. Diessner and Col. Chambers to Maj. General Noyes, Commanding General of Brooke Army Hospital, Fort Sam Houston, Texas. The requests were denied.

Upon receiving my potential military occupational specialty classification (PMOS) as medical laboratory technician, which is not a doctor's work, and requires no more than a four months' training of a layman in the medical field service school, I realized that I was not to be assigned to a medical specialist category. I thereupon immediately sought administrative relief and remedy within Army channels as follows:

(a) I immediately consulted the legal assistance officer, Military Replacement Training Center, Brooke Army Medical Center, Fort Sam Houston, Texas, and inquired concerning application for administrative relief of the assistant legal officer on duty, Cpl. Milton Venier. He referred me to the Army regulation which I now know was AR 615-365, par. 3 *d*, as amended, reading as follows:

> "To dispose of cases involving an individual claiming that prior to induction he was denied a procedural right as provided by the Universal Military Training and Service Act, as amended, and he was therefore erroneously inducted.
>
> "All requests for discharge under this provision will be forwarded to the officer having discharge authority and by him to the Director of the Selective Service System, Washington
> 20 25, D. C., for his recommendation. The officer having discharge authority will discharge the individual or retain him in the service in accordance with the recommendations made by the Director of the Selective Service System."
>
> "6th Army memorandum No. 181, par. 4, August 10, 1951, replacing or amending AR 615-365, par. *d*, dated August 10, 1951."

This assistant legal officer advised me that in his opinion the question or right involved in my case was not procedural but in-

volved a substantial question of law, and that he could find no appropriate administrative channels by which it could be considered. He further suggested that since I was about to be given leave, prior to transfer to Fort Lawton, Seattle, Washington, that I take the matter up with the Inspector General in Washington, D. C., during my leave.

(b) Prior to leaving Fort Sam Houston, I made similar inquiry of Capt. Albert T. Wellner, Assistant Adjutant, Medical Service Corps. I asked him how I might be able to resolve the situation in which I found myself through Army administrative channels. He advised me to call upon the Surgeon General of the Army, while passing through Washington, D. C., during my leave.

(c) Upon arriving in Washington, D. C., during my leave, early in December, 1951, I called upon Brig. Gen. Fay Prickett, acting for, or as, the Inspector General. He referred me to Lt. Col. Beaudry, whose given name I do not remember. Lt. Col. Beaudry advised me that the problem could be resolved only in
21 the Surgeon General's office, and referred me to that office.

(d) I went to the office of the Surgeon General and was referred to Lt. Col. Jones, whose initials I believe to be J. A. He supervised the processing of my application for commission. At the conclusion of the processing of my application for commission, he advised me that it might take from six months to a year before the commission could be finally acted upon.

(e) I thereupon personally went to the office of the Judge Advocate General to appeal further, and was referred in his office to Lt. Col. Phillips. I consulted with Lt. Col. Phillips, who later called in Lt. Col. Jones of the Surgeon General's office, and they considered my case together with me. Upon learning that it might take a year before my application could be finally passed upon, it was requested on my behalf by my attorneys, David Rein, Esq., and Stanley Faulkner, Esq., that I be discharged from the Army pending final action on my application for commission, and until it was determined whether my commission would be granted or denied. My attorneys and I were advised that there was no possibility of this being done.

4.

Upon learning that no further administrative relief through Army channels was available to me, I directed my attorneys to bring habeas corpus proceedings in my behalf in Washington, D. C. The petition for writ, filed on my behalf, was denied
22 by the Court, without prejudice, upon the ground that I

was not detained in Washington, D. C., and that, therefore, jurisdiction for habeas corpus did not exist.

5.

I have been at all times, and am now, willing to serve in the Army of the United States as a medical specialist, that is, as a medical doctor. I have offered my services as a doctor in the grade or rank of private, as hereinabove set forth, but have been advised, as admitted in the answer filed herein, that I can serve in such capacity only upon being commissioned.

/s/ STANLEY J. ORLOFF

IN UNITED STATES DISTRICT COURT

Findings of Fact and Conclusions of Law—Jan. 10, 1952

This matter came before the Court, sitting without a jury, upon the Amended Petition of Stanley J. Orloff for a Writ of Habeas Corpus, an Order to show cause directed to the respondents, Rex E. Willoughby and C. P. Lines, petitioner appearing in person and being represented by his attorneys John Caughlan and Siegfried Hesse, respondent Rex E. Willoughby being represented by J. Charles Dennis, United States Attorney, and John E. Belcher, Assistant United States Attorney, and Major Robert O. Hillis,—respondent C. P. Lines having been dismissed—and each party
23 having introduced evidence and submitted briefs, and the Court having taken said matter under advisement and having heretofore rendered its oral opinion in the matter, now makes and enters its

FINDINGS OF FACT

I.

The jurisdiction of this Court arises under Section 2241, Title 28, United States Code, in that petitioner is in custody under and by color of the authority of the United States, and is a soldier in the Army of the United States, under the command of the respondent Rex E. Willoughby, Commanding Officer, Fort Lawton, Washington.

II.

Respondent Rex E. Willoughby is a Colonel of the United States Army, and is the commanding officer of Fort Lawton, and the person exercising general authority over said fort and over the person of petitioner herein.

III.

Petitioner is a medical doctor, duly and regularly admitted to the practice of medicine in New York State, and having actually engaged in the practice of medicine as a doctor for the New York Department of Mental Hygiene, for the past four years, as a psychiatrist; and at the time of his induction into the Army of the United States hereinafter mentioned, was a Senior Psychiatrist. Petitioner is a graduate of the Tulane University School of Medicine. Petitioner is 27 years of age, having been born April 5, 1924, and is married and has a wife and two children dependent upon him.

24

IV.

That petitioner was inducted for service in the Armed Forces of the United States, to-wit: the Army of the United States, as a soldier in the grade of private at New York City, July 26, 1951 pursuant to Public Law 779, 81st Congress, 2nd Session, and at all times since has been and now is a private in the Army of the United States presently assigned to and a member of Enlisted Replacement Center, Fort Lawton, Washington for shipment to the Far East Command of the Army of the United States, pursuant to par. 32 Special Orders No. 242, Headquarters Medical Replacement Training Center, Brooke Army Medical Center, Fort Sam Houston, Texas, dated November 30, 1951.

V.

The court further finds that at the time of registration or induction pursuant to Public Law 779, 81st Congress, 2nd Session, petitioner was not a member of a reserve component of the Armed Forces of the United States and had not theretofore, since
25 August 14, 1945, had active service in the Armed Forces of the United States.

VI.

The court further finds that petitioner made application on December 10, 1951, for appointment as an officer in the Army Medical Corps Reserve, which application is still pending.

VII.

The court further finds, and the parties have stipulated in open court, that petitioner did not make application for discharge to the respondent Rex E. Willoughby at any time prior to December 29, 1951 when the petition for writ of habeas corpus was filed herein.

Conclusions of Law

From the foregoing findings of fact the court concludes as a matter of law:

I.

That this court has jurisdiction of the subject matter of the case and of petitioner and the respondent Rex E. Willoughby, Commanding Officer, Fort Lawton, Washington.

II.

That petitioner was regularly and lawfully inducted for service in the Armed Forces of the United States under the
26 provisions of Public Law 779, 81st Congress, 2nd Session, and is now lawfully a soldier in the grade of private in the Army of the United States.

III.

That petitioner is now lawfully a soldier in the Armed Forces of the United States in the grade of private in the Army of the United States and assigned to the Enlisted Replacement Center, Fort Lawton, Washington, under the command of respondent Rex E. Willoughby, Colonel, United States Army, and as such is subject to all lawful military orders and directives of the Armed Forces of the United States, including respondent Rex E. Willoughby as Commanding Officer of Fort Lawton, Washington.

IV.

That petitioner is not unlawfully in custody or unlawfully restrained of his liberty or unlawfully detained by the respondent Rex E. Willoughby.

V.

That the petitioner is not entitled to the writ of habeas corpus, and respondent is entitled to the judgment of this court denying the writ of habeas corpus and an order to discharge the rule to show cause.

Done in Open Court This 10th Day of January, 1952.

William J. Lindberg
United States District Judge

27 IN UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

No. 2957

United States of America on the Relation of
STANLEY J. ORLOFF, *Petitioner*

v.

REX E. WILLOUGHBY, and C. P. LINES, *Respondents*

Judgment—Jan. 10, 1952

This matter came before the Court, sitting without a jury, upon the Amended Petition of Stanley J. Orloff for a Writ of Habeas Corpus, an Order to show cause directed to the respondent Rex. E. Willoughby, petitioner appearing in person and being represented by his attorneys John Caughlan and Siegfried Hesse, respondent Rex E. Willoughby being represented by J. Charles Dennis, United States Attorney, John E. Belcher, Assistant United States Attorney, and Major Robert O. Hillis, Judge Advocate General's Corps, Litigation Officer for the Army in this case, and respondent C. P. Lines having been dismissed, and each party having introduced evidence and submitted briefs, and the Court having considered the same and having heretofore rendered its oral opinion in the matter, and having made and entered its Findings of Fact and Conclusions of Law in writing, Now, therefore,

IT IS ORDERED, ADJUDGED AND DECREED that the application for
a Writ of Habeas Corpus herein be and the same is hereby
28 denied, and the Order to show cause heretofore issued herein be and the same is hereby discharged, to all of which petitioner excepts and exceptions are allowed.

DONE IN OPEN COURT THIS 10TH DAY OF JANUARY, 1952.

WILLIAM J. LINDBERG
United States District Judge

---

1 IN UNITED STATES DISTRICT COURT

Number 2957.

(Title omitted)

* * * * * * * * * * * *

Transcript of Proceedings

had in hearing on Order to Show Cause in the above-entitled and numbered matter; commencing at 10:00 o'clock a. m. on the 9th

day of January, 1952, at United States Court House, Seattle, Washington, before The Honorable WILLIAM J. LINDBERG, United States District Judge.

* * * * * * * * * * * *

2 **Colloquy Between Court and Counsel**

The Court: Before proceeding, this matter being on an order to show cause and a petition for writ of habeas corpus, would like to ascertain, first, if there is any dispute as to the facts.

Mr. Caughlan: Could I be heard on that a moment, your Honor? In the Answer filed to Petitioner's application for writ of habeas corpus, which we received yesterday, it is alleged as a third affirmative defense that on page three (3) of that Answer, as follows:

> That Petitioner has failed to exhaust his administrative remedies provided for by paragraph 3 (d) of Army Regulations 615-365, dated the 14th of June, 1951, promulgated by the Department of the Army.

We have prepared, mainly with respect thereto, a Traverse to that portion of the Answer and Return which sets forth in detail the steps taken by the Respondent (Petitioner) in the exhaustion of such administrative remedies as he might have ascertain

3 under this or any other regulations of the Army.

Now, I don't know whether the Respondents desire to insist upon that affirmative defense as a factual matter, but, if they do, we certainly desire to establish that administrative remedies have been exhausted.

Other than that, I think there is substantially no dispute as to the facts.

We have, as I say, prepared this Traverse, which is being typed and should be here any moment, which sets forth, first, that the Petitioner was advised of the very regulation referred to by the Army; upon inquiry was further advised, by the Legal Office at Fort Sam Houston, that the regulation referred to referred to procedural rather than substantive right and was not applicable to him, and, secondly, he was advised that his rights should be taken up with the Inspector General of the Army; and was further advised by the Legal Office, and by the Adjutant's Office at Fort Sam Houston that his problem should be taken up with the Surgeon General.

Following those recommendations, he appealed to the Inspector General of the Army, when he was on leave just prior to coming to Seattle, and that appeal was considered and he was referred to the Surgeon General's Office by the Inspector General's Office, and they further considered the appeal, and that in connection there-

with he applied for a discharge by reason of the fact that he was advised he could not serve as a doctor, and that such discharge was refused him.

Now, those matters that I have just stated are, in substance, in issue in this case.

4 If the Respondents make any issue of them, in view of their question as to the administrative remedies, and their denial of paragraph number ten (10) of our Petition—as to which I would like to make oral amendment in accordance with the statement I am going to make in a moment—those matters are in issue, and we think should be, either by agreement, or by testimony, or by the affidavit and traverse that I have referred to, be disposed of in this case, because we feel that the matter is of considerable importance that this issue must be disposed of.

Now, with reference to paragraph ten (10) of our Petition—

The Court: Before we proceed on that: Major Hillis, are you to handle the argument in this matter?

Major Hillis: I will handle part of it. I don't know what part Mr. Belcher will assign to me, but I will handle part of it.

The Court: On this particular issue, the third affirmative defense, as shown in your Return, or Answer, to the Writ; are you contending as set forth in that defense?

Major Hillis: Yes, sir. Insofar as any issue of fact in our behalf, I believe that Mr. Caughlan and myself will have no difficulty in agreement upon the single issue of fact that would be material to—

The Court: This hearing?

Major Hillis: Yes, sir, this hearing.

5 The Court: Perhaps we might proceed then with the thought that, as to that issue, it may be before we proceed we can stipulate.

Mr. Belcher: There is a further matter, if your Honor please, and that is the allegation in the Petition that the Petitioner is not being utilized—that his services are not being utilized—in the category in which he was inducted.

The Court: Does that relate to the third affirmative defense?

Mr. Belcher: Yes; and we, of course, would want to offer evidence on that phase.

The fact is that the Petitioner is now in transit to the Eastern Command under military orders.

Naturally, he is not performing any services while he is in transit; but we will want to show by one of the officers, by Colonel Craig, for instance, and Colonel Willoughby, facts relating to doctors who are under draft.

We don't want to admit that he is not eventually going to be assigned.

He is in transit at the present time under Army orders to the Eastern Command, wherever that may be. It may be in Japan. It may be elsewhere.

He admits, I think, in his Complaint that he has made an application for a commission. That commission is under investigation.

I submit, if your Honor please, that under those circum-
6 stances, the action is premature.

The Court: Well, the sole question that the Court has in mind is this:

That under the third affirmative defense, and where there is a dispute on the facts, if the Petitioner has failed to exhaust his administrative remedies, it may serve to deprive the Court of jurisdiction.

Mr. Belcher: That is the point I am getting at.

The Court: If that issue for the time being may be set aside and we proceed on the other issues, it may be unnecessary to—

Major Hillis: I don't know any reason why we can't.

The Court: So that we will proceed, setting that issue aside for the time being.

Mr. Caughlan: Yes, but although, let it be understood, and I take it your Honor is not indicating any predisposition on this matter, but let it be understood, and it might be on behalf of either side, that we desire, and I am sure all parties desire, that the record in this case—I think that the matter is of importance to the Army as well as the Petitioner—I think that all parties desire that the record be complete on the question, any question of, importance to the ultimate decision in this case.

So that we would not have any objection to proceeding at this time without taking that up, but we do feel, and I am sure Re-
spondents would feel, that the record should be complete
7 on that before any final disposition of the matter, because of its importance to the case.

We would be inclined to agree, generally, that if there are proper administrative channels which can be pursued and the person has failed to exhaust those channels, that he should exhaust them before coming into Court.

We are prepared to show he has exhausted them, and we would be prepared to show that, on behalf of Respondent, or Petitioner, that he has exhausted them.

That would be our only feeling on handling other matters prior to that.

Mr. Belcher: We will desire to introduce certified copies of this man's Service Record, and all steps leading up to his induction; his application for commission, and so on.

J. Orloff, for a writ of habeas corpus, and the Court having considered said petition, and being advised in the premises, Now Therefore,

IT IS HEREBY ORDERED that Rex. E. Willoughby and C. P. Lines, commanding officers of Fort Lawton, and of the Casual Enlisted Section, Fort Lawton Personnel Center, respectively, of Seattle, Washington, or such other person or persons as may be temporarily acting in the capacity of commanding officer of Fort Lawton, or commanding officer of the Casual Enlisted Section,
6 Fort Lawton Personnel Center, be, and they are hereby, ordered to appear before the undersigned Judge of the above entitled Court at his court room in the United States Court House in the city of Seattle, King County, Washington, at the hour of 10 A. M., on Wednesday, the 9th day of January, 1952; and then and there to deliver the body of Stanley J. Orloff, before the Court; and to show cause, if any cause there be, why the prayer of Stanley J. Orloff for a writ of habeas corpus, directing that he be forthwith released from the custody of said Rex E. Willoughby and C. P. Lines or other persons temporarily acting in the capacity of commanding officer of Fort Lawton, or of commanding officer of the Casual Enlisted Section of Fort Lawton Personnel Center, of Seattle, Washington, should not be granted.

DONE IN OPEN COURT THIS 31ST DAY OF DECEMBER, 1951.

/s/ WILLIAM J. LINDBERG
District Judge

IN UNITED STATES DISTRICT COURT

Return to Order to Show Cause

Come now the respondents above named and for return to the order to show cause herein as to why a writ of habeas corpus should not issue discharging petitioner Stanley J. Orloff from the
7 Army of the United States because he has not been granted a commission as a medical officer in the Army of the United States and respectfully shows:

I.

That the said Stanley J. Orloff is an inductee in the Armed Forces of the United States for the period of twenty-one months, under the provisions of Public Law 779, 81st Congress, 2nd Session, and the Selective Service Act of 1948 as amended, and is under the exclusive jurisdiction of the Army of the United States as a soldier in the grade of private presently serving under the command of respondent Rex E. Willoughby.

These medical men are inducted as privates in the beginning and they are tendered a commission. They make an application for a commission, as the Petitioner in this case did.

There is no allegation in this Petition that that commission has been denied him. The Answer shows that the commission, the application for the commission, is still under consideration.

As I take it, the only thing that the Petitioner complains of here is that he has not been granted a commission.

Mr. Caughlan: Could we clear this up immediately?

There are certain things we want to be sure are understood; and, while we are talking about that, there is no insistance
8 in this case, there is no question involved in this case, so far as the Petitioner is concerned, as to the Army's granting him a commissionor not granting him a commission.

That is not involved.

We are not even suggesting that this Court could or should grant to Dr. Orloff a commission as an officer.

The sole and main position that is taken here by the Petitioner, which we think is the primary issue and which we believe the Respondents will agree is the primary issue, is this:

That in view of the fact that this is plainly discriminatory legislation—I don't know at this point whether it is legal or constitutional or unconstitutional, but, in view of the fact that it is plainly discriminatory legislation—the singling out of doctors as a class and permitting their induction into the Armed Services, is the failure of the Army, as alleged and admitted—which I want to discuss in just a moment—to utilize the services of Dr. Orloff as a doctor unlawfully so as to entitle him at this time to a discharge until they are prepared to use his services as a doctor.

Now, that is the only issue that is involved here.

We are not asking anybody to give anybody else a commission. I want to clear that up.

The Court: All right; let us proceed now to determine whether there are any questions of dispute, and, if so, whether it is necessary to have any further showing either by way of testimony or affidavit.

9 The Court is going to take the Petition and the Answer and determine what issues are in dispute.

Mr. Caughlan: If it will be helpful to the Court, I have taken the Petition and underlined every portion of it that is admitted and bracketed every portion of it that is denied.

I don't know whether Mr. Belcher has done the same thing, but it will take a very short time to outline what is admitted and denied in the Petition, in view of the fact, of course, that the Answer and Return referred to numbers, and so on

Whatever procedure your Honor feels is desirable.

II.

That this court is without jurisdiction of the subject matter of the petition.

III.

That petitioner heretofore filed a petition for a writ of habeas corpus in the United States District Court for the District of Columbia which was denied and from which denial petitioner is presently prosecuting an appeal to the United States Court of Appeals for the District of Columbia.

WHEREFORE respondents pray that the order to show cause heretofore issued herein be discharged.

Affidavit of Rex E. Willoughby

REX E. WILLOUGHBY, being first duly sworn, on oath, deposes and says that he is a Colonel in the United States Army and
8 presently the Commanding Officer of Fort Lawton, in King County, State of Washington.

That Stanley J. Orloff, a private in the Army of the United States is under his command at Fort Lawton, King County, Washington by authority of the United States as a member of the Army of the United States lawfully inducted on July 26, 1951, for twenty-one months of service in the Armed Forces of the United States under the provisions of Public Law 779, 81st Congress, 2nd Session, approved September 11, 1950 (50 USCA Appendix 454 (i) (1)) under the following circumstances:

That the said Stanley J. Orloff is a male person born April 5, 1924, and on July 26, 1951 he was 26 years 3 months and 20 days of age who previously was enrolled in and received professional, technical, and specialized training as a doctor of medicine in the medical school of the Tulane University of Louisiana between July 16, 1943 and August 14, 1945 under the Army Specialized Training Program. Petitioner was honorably discharged from the above service in the Army on August 14, 1945 and otherwise did not thereafter perform active military duty until July 26, 1951.

That the said Stanley J. Orloff was on and prior to July 26, 1951 a medical doctor, duly and regularly admitted to the practice of medicine in the State of New York and for an unknown period of time before July 26, 1951, was a Senior Psychiatrist at the Creedmoor State Hospital in the State of New York.

That the said Stanley J. Orloff was not on July 26, 1951, a member of a reserve component of the Armed Forces.

9 That on July 26, 1951, at New York City, State of New York, the petitioner Stanley J. Orloff was inducted in the Armed Forces for twenty-one months of service in the Army of the

United States in the grade of private pursuant to and in accordance with the provisions of the Public Law 779, 81st Congress, 2nd Session, and the Selective Service Act 1948, as amended, and thereupon was assigned to New York City RMS, Recruiting Detachment No. 2, 1202d Area Service Unit, Headquarters First Army, Governors Island, New York. On the same date the petitioner was relieved from such above assignment and transferred in the grade of private to the 1277th Area Service Unit, Reception Center, Camp Kilmer, New Jersey, for processing and subsequent assignment.

Thereafter on August 4, 1951, petitioner was relieved from assignment at Camp Kilmer, New Jersey, and transferred under competent military orders to the Medical Replacement Training Center, Brooke Army Medical Center at Fort Sam Houston, Texas, for basic military training as medical personnel inducted in the Armed Forces of the United States under the provisions of Public Law 779, 81st Congress, 2nd Session. After receiving sixteen weeks of Army Medical Service training at the above Replacement Training Center, the petitioner was awarded a potential military occupation specialty as a Medical Laboratory Technician and was ordered on November 30, 1951, by competent military authority to proceed on December 2, 1951, to the Fort Lawton Personnel Center, Seattle, Washington, reporting not later than December 19, 1951, which reporting date was later extended to December 29, 1951, for shipment to the Far East Command as part of a December 1951 shipment.

On December 10, 1951, petitioner applied for appointment as an officer in the Army Medical Corps Reserve and such application is now pending and under consideration but has not been finally acted upon.

On December 13, 1951, petitioner filed his petition for a writ of habeas corpus in the United States District Court for the District of Columbia and named as respondents Robert A. Lovett, Secretary of Defense; Frank Pace, Jr., Secretary of the Army; General J. Lawton Collins, Chief of Staff, United States Army; Major General William E. Bergin, Adjutant General, United States Army, and; Major General G. E. Armstrong, Surgeon-General, United States Army. Affiant is informed and states upon information and belief that the foregoing petition was heard by a District Judge in the United States District Court for the District of Columbia on December 17, 1951, and was dismissed, whereupon the petitioner noted an appeal which is now pending and undecided in the United States Court of Appeals for the District of Columbia but such appeal is docketed for hearing on January 25, 1952. Petitioner thereupon reported to the Enlisted Replacement Center, Fort Lawton, Seattle, Washington, on December 29, 1951, and is now as-

signed to and present for duty with that organization which is one of the units located at Fort Lawton, Washington under the command of the affiant.

Affiant further deposes and states that Respondent C. P. Lnes is a Captain in the Army of the United States but he is not
11 the Commanding Officer of the Casual Enlisted Section, Fort Lawton Personnel Center, Seattle, Washington; or the person exercising direct and immediate custody over and control of petitioner as alleged by petitioner in paragraph four (4) of the petition herein.

Affiant denies that the provisions of Public Law 779, 81st Congress, 2nd Session (50 USCA Appendix 454 (i) (1)) permit and authorize the induction of medical doctors for service in the Armed Forces only as medical doctors. Instead and in lieu thereof, such Public Law, the Selective Service Act of 1948 as amended (50 USCA Appendix 451-471), the Proclamations, Executive Order, rules and regulations issued and promulgated pursuant thereto by the President of the United States, permit, authorize, and make petitioner liable for induction for not to exceed twenty-one months of service in the Armed Forces in the same manner, to the same extent, and under similar circumstances as other persons liable for training and service under the provisions of the Selective Service Act of 1948 as amended.

That as a soldier in the grade of private in the Army of the United States, assigned to a unit under the command of affiant, the petitioner is a person subject to military jurisdiction and liable to further competent military orders and service, including shipment to the Far East Command in compliance with pertinent and applicable directives and regulations of the Department of the
12 Army issued by direction of the President of the United States of America, as Commander in Chief of the Armed Forces.

For the reasons hereinbefore set forth the respondent herein respectfully prays the court to discharge the order to show cause herein and dismiss the petition for the said writ of habeas corpus.

/s/ REX E. WILLOUGHBY
Rex E. Willoughby

IN UNITED STATES DISTRICT COURT

Answer to Petition for Writ of Habeas Corpus

Come now the respondents above named and for answer to the petition for a writ of habeas corpus herein, admit, deny and allege:

Mr. Caughlan: Yes.
Mr. Belcher: Yes.
The Court: That is admitted?
Mr. Caughlan: Yes.
Mr. Belcher: Yes.
The Court: Paragraph eight (8):
Mr. Caughlan: I think that is admitted in its entirety, except as to the conclusion of law, namely, the custody contrary to the provisions of law.
As we read it, everything else is admitted in that paragraph.
Mr. Belcher: Yes; that is correct.
The Court: Is that correct, except as to legal conclusions?
Mr. Belcher: Yes.
The Court: Paragraph nine (9):

14 "Although petitioner has been in the United States Army from July 26, 1951, to the present, at no time during this period has he been employed or permitted to work as a doctor of medicine. He has requested an opportunity to work as a doctor of medicine with or without a commission, but this request has been denied."

Mr. Caughlan: We understand that the first sentence of that paragraph—
The Court: Is admitted?
Mr. Caughlan: Is admitted; and that, as to the second sentence, it is—
The Court: Is it material?
Mr. Caughlan: It is simply lack of knowledge. I don't know whether it is material. They say they have no knowledge and we say that he has made such request, and we are prepared to establish it.
The Court: Mr. Belcher, can that be admitted for what it is worth?
Mr. Belcher: For what it is worth; yes.
The Court: Major Hillis, are you in agreement?
Major Hillis: Yes.
The Court: Paragraph ten (10) is denied.
Mr. Caughlan: Now, may it please the Court, with respect to paragraph ten (10), we would admit that paragraph ten
15 (10) is, as presently pleaded, inadvertently incorrect.
The paragraph ten (10) reads:

"The petitioner has requested of the respondents that, in view of their refusal . . ."

By "respondents", at the present time we mean Colonel Willoughby.

I.

Answering paragraph I respondents admit that petitioner is presently a soldier in the grade of private in the Army of the United States and stationed at Fort Lawton, Washington, pursuant to his induction under Public Law 779, 81st Congress (48 USCA, Section 454 (i) (1)) and is under the command of respondent Rex E. Willoughby, Commanding Officer, pursuant to the laws of the United States, but deny each and every other allegation, matter and thing in said paragraph contained.

13 II.

Answering paragraph II, respondents admit the same.

III.

Answering paragraph III, respondents deny the same, especially the alleged jurisdiction of this court to control or otherwise determine matters pertaining to matters strictly military, exclusive jurisdiction covering which is by Congress vested in the President of the United States as Commander in Chief, and especially do respondents deny that petitioner is in custody contrary to law.

IV.

Answering paragraph IV, respondents admit that Rex E. Willoughby is a Colonel in the United States Army and commanding officer of Fort Lawton, Washington, and the person exercising general authority over the fort and over the person of the petitioner, but deny the balance.

V.

Answering paragraph V, respondents admit the same.

VI.

Answering paragraph VI, respondents admit that petitioner is subject to Public Law 779, 81st Congress, 2nd Session (50 USCA Appendix 454 (i) (1)) providing for the induction of medical doctors but deny each and every other allegation, matter and thing therein contained.

VII.

Answering paragraphs VII and VIII, respondents admit
14 petitioner's grade in the Army of the United States is that of private and he is not engaged in service as a medical doc-

There has been no such request ever given to Colonel Willoughby and we ask leave, in order that the pleadings may present the issues in this case, to amend at this time paragraph ten (10) to read:

"Petitioner has requested the appropriate authorities and officers of the Army of the United States that, in view of their refusal . . ."

instead of Respondent, Colonel Willoughby.

The reason for that is, this was an inadvertent mistake. We were thinking of Respondent as being the United States Army, whereas, of course, Colonel Willoughby has not had such request made specifically to him.

Mr. Belcher: I think we would be entitled to know whether that request was made verbally, or in writing, and, if in writing, we would demand production of a copy of the writing.

Mr. Caughlan: We would like to ask leave at this time—

16 The Court: Isn't the question here whether or not he has made a request to be relieved, and that is the sole question?

Mr. Caughlan: That might involve the question that was referred to earlier in connection with paragraph four (4) of the third affirmative defense as to exhaustion of administrative remedies, and I would like to ask leave at this time to serve and file the Traverse with respect to that which sets forth, also, the details as to the requests for discharge, in order that the Respondent be advised of what facts are to be determined and to what extent they would admit and to what extent they would expect testimony concerning that administrative matter, which was included, or intended to be included, in paragraph ten (10).

We admit that that is inappropriately alleged.

The Court: We will tentatively defer the filing, Mr. Caughlan, until we get to that.

Mr. Caughlan: Very well.

The Court: Then ten (10) will stand denied as of now.

Paragraph eleven (11):

Mr. Caughlan: We understand that the affidavit of Colonel Willoughby, and the Return, substantially admit that paragraph, although it is formally denied.

Mr. Belcher: It is a legal conclusion.

Mr. Caughlan: As to the legal conclusion. I was referring to the unlawful restraint, but, as to the Respondent (Petitioner) being subject to the Far Eastern Command, and his

17 imminent removal from the jurisdiction, and that such action will take place except for the intervention of the Court, the affidavit of Colonel Willoughby, which is a part of the Return, sets forth virtually the—

tor, and admit the balance, save and except that petitioner is held as a private contrary to law.

VIII.

Answering paragraph IX, respondents admit the same except that they have no knowledge as to whether petitioner has requested an opportunity to work as a doctor of medicine with or without a commission.

IX.

Answering paragraph X, respondents deny the same.

X.

Answering paragraph XI, respondents deny the same except they admit petitioner is subject to further military orders.

FOR FURTHER ANSWER AND AS A FIRST AFFIRMATIVE DEFENSE, RESPONDENTS ALLEGE AND SHOW:

I.

That respondent Rex E. Willoughby is a duly commissioner Colonel in the United States Army and commander of the troops and all personnel assigned to his command at Fort Lawton, Washington.

II.

That petitioner was assigned to the command of respondent Rex E. Willoughby by the military authorities at Medical Replacement Training Center, Brooke Army Medical Center, Fort Sam Houston, Texas on November 30, 1951, effective December 29, 1951, for shipment to Far East Command.

15 AND FOR A SECOND AFFIRMATIVE DEFENSE, RESPONDENTS ALLEGE:

I.

That this court is without jurisdiction of the subject matter of the petition and that exclusive jurisdiction of both the subject matter and of the person of petitioner is by law vested exclusively in the President of the United States as Commander in Chief of the Armed Forces of the United States.

II.

That habeas corpus does not lie for the purpose for which the petition herein was filed.

III.

That in the event the court determines it has jurisdiction, then respondents pray for summary judgment under Rule 56 (*b*) United States Rules of Civil Procedure.

FOR A THIRD AFFIRMATIVE DEFENSE, RESPONDENTS SHOW TO THE COURT:

I.

That petitioner has failed to exhaust his administrative remedy provided for by paragraph 3 *d* Army Regulations 615-365 dated 14 June 1951 promulgated by Department of the Army.

FOR A FOURTH AFFIRMATIVE DEFENSE, RESPONDENTS SHOW TO THE COURT:

I.

That on December 10, 1951, petitioner under the provisions of law filed his application for appointment in the
16 Officer's Reserve Corps, Army of the United States, which application is presently being processed by military authorities because of particular statements made by petitioner in his application concerning prior membership or association with certain organizations designated by the Attorney General of the United States on October 30, 1950 pursuant to Executive Order 9835.

WHEREFORE respondents pray that the petition for the writ of habeas corpus be denied, and the rule to show cause be discharged.

IN UNITED STATES DISTRICT COURT

Traverse to Return and Answer of Respondent, Consisting of Affidavit of Petitioner, Stanley J. Orloff

STANLEY J. ORLOFF, being first duly sworn, upon his oath deposes and says:

I am the petitioner above named and I make this affidavit in support of my petition for a writ of habeas corpus, and by way of traverse to the return of respondent, as follows:

1.

During 1942 I applied for and received a commission as a second lieutenant in the Medical Administrative Corps, Reserves, Army of the United States, which commission I held until 1943, when I resigned it to enlist in the Army of the United States. Imme-
17 diately upon my enlistment I was assigned to the Army Spe-

cialized Training Program, as a medical student. Since that time I have applied for a commission in the Armed Forces three times. First, in 1945, in order to serve in the Army Medical Corps, upon completing my ASTP training. I was rejected for physical reasons and requested a waiver in order to obtain the commission despite my physical disability, and this request was also rejected. Thereafter, I was honorably discharged and continued in medical school as a civilian. Second, in May, 1951, prior to receipt of any induction notice, I applied for and was, in June, 1951, granted a commission as Captain, Medical Corps, U. S. Air Force, Reserve. Shortly thereafter, I was discharged from the U. S. Air Force, Reserve. Third, following my induction, namely, December 10, 1951, I again applied for a commission in the Medical Corps of the Army of the United States. I have not received any commission pursuant to this application, as will hereafter be more fully set forth. In addition to these applications I also made a special trip to Washington, D. C., from my home in New York, for the express purpose of applying for a commission in the United States Naval Reserve, and upon personal inquiry to the procurement officer, was advised that no application for commission in the Navy would be received because I was in priority classification I of the Selective Service System.

2.

At the time of my induction, I had completed four years of psychiatric training towards a diplomat of the National Board of Psychiatry. For more than a year prior to induction, I was assigned as a Senior Psychiatrist in the Creedmoor Institute for Psychobiologic Studies, New York State Department of Mental Hygiene, engaged in research work involving the etiology and treatment of mental disorders. The work of this institute in which I participated, devoting my full time to research work, received international recognition, the U. S. Army, among other organizations, expressed interest in our work.

In the period from 1950 to 1951, I did on two occasions scientific papers to statewide scientific conferences reporting on original work in the development of a rapid, objective, psychiatric diagnostic test. I also organized the first group therapy program for the treatment of psychotic patients at the Creedmoor State Hospital. I served on the faculty of the School of Nursing of Creedmoor State Hospital for three years as an instructor in psychiatry and neurology. I was also psychiatrist to the LaFargue Clinic in New York City for two years.

Immediately following my receipt of a 1-A Classification from the Selective Service System, my deferment was requested by the

The Court: I think the Court will proceed by reading here and, as we proceed paragraph by paragraph, we may ascertain what is agreed and what may be in dispute.

Now, as to paragraph one (1):

"Petitioner is now held in custody and in restraint of his liberty by color of the authority of the United States and he is presently detained by the United States Army at Fort Lawton, Washington . . ."

That is admitted, substantially, is it not?

Mr. Caughlan: We took it that that was admitted, except as to legal conclusions, if we can put it that way.

Major Hillis: That is probably as good a way as any to put it. It raises a legal conclusion, our conception of the language.

10 The Court: Insofar as it is properly pleaded, or alleged—

Major Hillis: Yes, sir.

The Court: —other than stated as a conclusion, it is admitted?

Major Hillis: Yes.

The Court: Paragraph two (2):

"Petitioner is so held in restraint pursuant to a purported induction into the United States authority . . ."

Mr. Caughlan: "Army", it should be.

The Court: ". . . assertedly under the authority of Public Law 779, 81st Congress (titled 48 USCA, Section 454 (1) (i)), and has so been held in restraint and so detained since July 26, 1951."

That is admitted.

Paragraph three (3):

"The jurisdiction of this Court arises under Section 2241, Title 28, United States Code, . . ."

That is a matter of law, is it not?

Mr. Caughlan: Yes.

Major Hillis: Yes.

11 Mr. Caughlan: Solely. That is in reference to the habeas corpus statute.

The Court: And then, paragraph four (4):

"Respondent Rex E. Willoughby is a Colonel of the United States Army, and is the commanding officer of Fort Lawton, and the person exercising general authority over said fort and over the person of petitioner herein; . . ."

That is admitted.

Now, the remaining portion as to C. P. Lines, that is denied. Is that conceded, Mr. Caughlan?

Mr. Caughlan: I am sorry, my attention wandered for a moment.

(Whereupon, there was discussion had between Counsel and Petitioner.)

Mr. Caughlan: Oh, yes. We do not feel that C. P. Lines, or any other person, simply as a company commander, is a material party.

It is admitted that Colonel Willoughby is the commanding officer at Fort Lawton and exercises general authority, and we, therefore, ask leave of the Court to amend the Petition by striking, in line four (4), "and respondent", to the end of paragraph four (4), so that it will simply refer to Respondent, Rex E. Willoughby, and further amend by dismissing the Petition as to Respondent, C. P. Lines.

Mr. Belcher: No objection to that.

12 The Court: Any objection?

Major Hillis: No objection.

The Court: The motion of dismissal as to C. P. Lines will be granted; and, further, the striking of the paragraph as mentioned by Counsel.

That leaves no question as to that.

Paragraph five (5):

"Petitioner is a medical doctor . . ."

That whole paragraph is admitted; is that correct?

Mr. Caughlan: We so understand it, your Honor.

Mr. Belcher: Yes.

The Court: Paragraph six (6):

Mr. Belcher: We admit it.

The Court: "Petitioner is not now and has not at any times since the date of his induction into the United States Army above stated been subject to any part of the Selective Service Law of the United States, title 50 A-p-p (spelling) U. S. C. . . ."

Mr. Caughlan: That should be "50 U. S. C. A." It is the act of June 19, 1950, as amended by the amendment to the Selective Service Act, now called Universal Military Training Service Act, and is 454 (a) through (j) in Code, Section 454, and Section one (1) to six (6) of the Act.

I think it may be stipulated that the Respondent (Peti-

13 tioner) is not subject to induction except pursuant to Section 454 (i) of the Act, namely the doctor's draft act.

Mr. Belcher: That may be stipulated.

The Court: Is that agreed?

Mr. Belcher: Yes.

The Court: Paragraph seven (7):

Mr. Caughlan: That is admitted in the Answer.

Mr. Belcher: Seven (7) and eight (8).

The Court: The fact?

Mr. Caughlan: The fact.

The Court: Insofar as this paragraph is concerned, Mr. Caughlan, isn't the admission on that sufficient?

In other words, they admit that the Petitioner is subject to further military orders. Isn't that all that it is necessary to admit?

Mr. Caughlan: I think it is. The affidavit of Colonel Willoughby reads:

> "... the petitioner is a person subject to military jurisdiction and liable to further competent military orders and service including shipment to the Far East Command in compliance with pertinent and applicable directives and regulations of the Department of the Army issued by direction of the President of the United States of America, as Commander in Chief of the Armed Forces."

We don't think that any more than that needs to be admitted, and there is no issue of fact or anything else.

18 The Court: All right. Then we will pass to the first affirmative defense.

That is admitted, I assume?

Mr. Caughlan: We admit that Colonel Willoughby is a Colonel, and we allege that, and that Petitioner was assigned to his command from the Brooke Army Medical Center.

The Court: Second affirmative defense. Of course, that is a matter of law.

Mr. Caughlan: That is a matter of law, your Honor.

The third—

The Court: The third is the one in issue now, and you are filing at this time—

Mr. Caughlan: Yes, your Honor. We ask leave at this time to file a Traverse to that by way of affidavit of Dr. Orloff.

The Court: It may be filed.

Mr. Caughlan: And we serve a copy on the Respondent. (Handing copy to Mr. Belcher.)

Mr. Belcher: No objection.

The Court: It may be filed.

Mr. Caughlan: Now, just for the convenience of the Court and the parties, I would like to state that the matters relating specifically to that affirmative defense and this traverse is included, commencing paragraph three (3), page three (3), from there to the end of page five (5), setting forth in detail the administrative relief sought through Army channels

19

The other matters are simply general matters concerning application for commission, and his history in the United States Army.

The Court: That answers the third affirmative defense.

As to the fourth affirmative defense—referring again to the third affirmative defense, your position is that Petitioner has exhausted his administrative remedy; is that correct?

Mr. Caughlan: Yes, your Honor. That is our position.

With regard to the fourth affirmative defense, we have covered the question as a matter of law in our memorandum, in our Traverse, and, in connection with the same matter of exhaustion of administrative remedy, we have set forth, on page five (5), subparagraph (d), if I may call your Honor's attention to what this is:

> "I went to the office of the Surgeon General and was referred to Lt. Col. Jones, whose initials I believe to be J. A. He supervised the processing of my application for commission. At the conclusion of the processing . . ."

The Court: May I ask where you are reading from, Mr. Caughlan?

Mr. Caughlan: Page five (5), of our Traverse, paragraph sub (d).

> ". . . At the conclusion of the processing of my application for commission, he advised me that it might take from six months to a year before the commission could be finally acted upon."

And the next paragraph, which also refers to his appeal to the Office of the Judge Advocate General, his further consultation with Colonel Jones and Lt. Colonel Phillips, in which he sets forth his request for discharge.

We mention that because of this suggestion that is made in this affirmative defense, that he filed under the provisions of law his application for appointment, and the suggestion—although not the statement—that a commission might be issued tomorrow, or something like that.

That is not the fact and so far as that is suggested in that fourth affirmative defense, it is denied.

Otherwise, it is true that he has filed his application.

It is also our legal contention that, under the provisions of this law, it is the duty of the Army to tender him a commission at the earliest possible time immediately upon his induction.

The Court: Well, now, you have had an opportunity to read the pertinent parts. Now do you see any need to introduce any testimony?

Mr. Caughlan: I will have to make inquiry on that.
21 Except as to the matter of request for discharge, and exhaustion of administrative remedies, I think we see no need for the introduction of any testimony.

Mr. Belcher: I think Major Hillis can present that at this time, if your Honor please.

Major Hillis: It probably would be well, if your Honor please, to clarify that issue, and the Government's position on it, in order to determine whether we are all talking about the same thing.

We are talking, in our Answer, about an Army Regulation.

That Army Regulation—and I assume Mr. Caughlan has a copy of it; if you do not, I have a copy for you—

Mr. Caughlan: I have no copy. We transcribed what Major Safko read over the telephone to us yesterday. It appears on page four (4) of this affidavit. You might check to see whether we have it.

Major Hillis: I am referring to Army Regulation 615-365, covering subject of discharging enlisted personnel from the Army for convenience of the Government, and therein is set forth a number of categories of persons who may request discharge, and, particularly, our position in this regard, we feel, falls under paragraph 3 (d).

That paragraph reads:

22 "To dispose of cases involving an individual's claim that prior to induction he was denied a procedural right as provided by the Selective Service Act of 1948 and was, therefore, erroneously inducted.

"All requests for discharge under this provision will be forwarded to the officer exercising discharge authority and by him to the State director of the selective service system of the State of the applicant's registration for his recommendation.

"The officer exercising discharge authority will discharge the individual . . ."

It reads:

". . will discharge the individual." " . . or retain him in the service in accordance with the recommendation made by the State director of the Selective Service System."

Now, it is our position with respect to this pending case and our Answer, that at no time prior to the filing of the application, or the petition for a writ of habeas corpus against Colonel Willoughby, did this Petitioner request Colonel Willoughby,
23 who is, by this regulation, the discharging authority about which this regulation is speaking, and that at no time was he ever presented with such a request, or accorded the oppor-

tunity of processing that request in compliance with this regulation.

Now then, as to that, if the Petitioner will admit that, then for my position there is no controversy and we could proceed under this affirmative Answer.

If it may be admitted that at no time prior to the filing of this application, and while the Petitioner has been under the jurisdiction of this Court, has he filed a request for a discharge pursuant to paragraph 3 (d), then that is the only fact that I would like to develop otherwise by testimony.

That is, briefly stated, what our position is in that regard.

The Court: I believe you admitted that that had not been done.

Mr. Caughlan: May it please the Court, that is true. There has been no request made to Colonel Willoughby. There is no question about that. He has not been requested for discharge.

The facts relating to that is that prior to his being assigned to this command he has requested Major—made the request of his—he had made the request of a discharge, or processed his request through Army channels right up to the Inspector General, Judge Advocate General and the Surgeon General, and had personally and particularly filed his requests in those offices and com-
24 pletely exhausted all administrative remedies.

There is no question that, having done that, with due respect to Colonel Willoughby, he went back to the field command, because such procedure was not even necessary.

It is our position, however, that if this is the subsisting order—and I might advise Major Hillis that Major Safko said it was rescinded August 10, 1951, and that a slightly different regulation, that he read to me, was issued, although I just have his knowledge of that—he was reading from an authenticated copy of the Secretary of the Army that they sent on 2 January—the matter is immaterial—but, I do think that there is no question of application being made to Colonel Willoughby.

We do contend, however, that there is no question in this case of a denial of a procedural right prior to induction, which is the only thing that this refers to.

This regulation reads:

". . . cases involving an individual claiming that prior to induction he was denied a procedural right . . ."

The Court: You are not contending that?

Mr. Caughlan: ". . . as provided by the Universal Military Training and Service Act . . ."

We are not claiming that at all. We don't see how it could have any application in this case, or have anything to do
25 with exhausting his administrative remedy.

Major Hillis: Mr. Caughlan was then speaking about a legal question.

I understood we were limiting ourselves to trying to determine what the fact was.

Mr. Caughlan: As I say, it is the fact, which we admit, that the Petitioner has not requested Colonel Willoughby for discharge.

Mr. Belcher: Then on that admission I move—

The Court: I don't think there is testimony on that issue. Are you in agreement?

Major Hillis: I think if that is true we are all right.

Mr. Belcher: I think on that admission of Counsel we are entitled to dismissal of this application.

The Court: You can make the motion. The Court at this time, I don't think, would be disposed to act on your motion. You can make it.

Major Hillis: If the Court please, as I understand the rule, and I am not an expert on habeas corpus:

Unless the Court deems that it wants evidence, that the matters alleged in the Petition for Writ and in the Answer, evidentiary matters, can be accepted as true.

Am I correct in that?

I am addressing myself particularly to the affidavit of Colonel Willoughby. We feel that that affidavit fully sets forth in-
26 formation which is pertinent to the Government's position.

The Court: It becomes admitted except insofar as it is denied by the Traverse.

Major Hillis: And I am particularly interested that, if the facts about which we are talking do not extend to a showing of the prior service of this individual as a member of the Army Specialized Training Program, in 1943, '4 and '5, and the fact that he does not hold a Reserve commission, those are facts which we must establish—which the Government must establish. If they are admitted, why, then that presents a different matter.

The Court: Are those facts in the pleadings?

Major Hillis: They are included in the affidavit of Colonel Willoughby attached to the Return.

Mr. Caughlan: They are set forth, I might say, in detail.

Also, and I am sure there is no dispute about this and if Major Hillis desires to examine it they are set forth in detail in paragraph one (1), commencing on page one (1), line twenty-four (24) and twenty-five (25) of our Traverse.

So that it is clearly set forth that this man, Dr. Orloff, did have training under the Army Specialized Training Program, and that he did not at the time of his induction hold a Reserve commission, he having theretofore applied for one, a commission of captaincy having been issued to him and he thereafter having been dis-

charged from the commission a few days before his induction.

27 Major Hillis: I believe this has been helpful and time-saving, your Honor. I think we are approaching a meeting of the minds on the facts, the complete facts, in this case in a manner that will put them beyond dispute.

The Court: That is what the Court is concerned about. Have you examined that?

Major Hillis: Not fully.

The Court: I suggest we take about fifteen (15) minute recess and you can examine that and, upon return, we may be able to stipulate.

Mr. Caughlan: I think that would be very wise, your Honor.

The Court: And, likewise, if you find it advisable to introduce some regulations, you can determine what regulations shall be entered or introduced as exhibits; any regulations that are not now a matter of record.

Mr. Belcher: In addition to that I think we will want to introduce the certified record showing the Petitioner's application for a commission which contains certain statements that require, under the Government's loyalty program, some intensive investigation before a commission can be granted.

The Court: We will take this recess and you may determine that, and possibly Mr. Caughlan would have no objection, and then we will proceed and we may save time.

Mr. Caughlan: Yes, sir; I think that is wise.

28 The Court: We will take a fifteen (15) minute recess.

(Whereupon, at 10:45 o'Clock, a. m., a recess was had until 11:20 o'Clock, a. m., January 9, 1952, at which time, Counsel heretofore noted being present, the following proceedings were had, to-wit):

The Court: You may proceed.

Mr. Caughlan: May it please the Court, I believe the parties have reached substantial agreement as to all the pertinent facts in this case, and Major Hillis, or Mr. Belcher, will correct me if I mention anything that is not correct.

We understand that the Respondent desires to introduce several portions of Army Regulations; a statement as to what the potential military occupational specialty of Dr. Orloff's is; what he is presently assigned to.

They desire to introduce his Army history, or Army record, including previous commissions held by him; his course in the Army Specialized Training Program; his applications for commission prior to induction and after induction.

I also understand, and we have more or less agreed, that the documents so introduced substantially confirm and document the affidavit, or Traverse, if we can put it that way, that was filed this morning, so that that was likewise accepted for what it was worth.

Leaving the only issue of fact—

One more point and with regard to the exhaustion of ad-
29 ministrative remedy, it is, we understand, substantially agreed that the things and matters that are set forth in the affidavit were done, and we understand, we have stipulated also, that no application in writing under paragraph 615-365, if that is—

Major Hillis: Paragraph 3 (d).

Mr. Caughlan: Paragraph 3 (d) has ever been made to any person in the Army and, in particular, that no application in writing for discharge has been made to Colonel Willoughby under that provision.

Those facts, those matters, I believe, are agreed and stipulated to by and between the parties, which will eliminate a very substantial part of any factual matters in dispute.

Mr. Belcher: That is correct, your Honor.

Mr. Caughlan: Is that correct?

Major Hillis: That is correct.

Mr. Caughlan: That leaves, your Honor, one matter that both parties feel would require a certain amount of oral testimony.

That is: What is the significance in terms of training and utilization of a doctor's skill in the potential military occupational specialty to which Dr. Orloff is now assigned?

It was suggested, and thought by both parties to be proper, that Dr. Orloff be placed upon the stand and qualified as an expert to state his views with respect to that, and, we understand, that Colonel Craig—who is the Post Surgeon, is that correct?

30 Major Hillis: Post Surgeon at Fort Lawton.

Mr. Caughlan: Post Surgeon at Fort Lawton—may also desire to supplement, or testify differently, or otherwise testify concerning that.

That is, in substance, the only real issue in dispute here.

All other facts are substantially agreed to as is stated, as the Court is advised, in this statement on our part.

Mr. Belcher: That is agreed to, your Honor.

* * * * * * * * * * * *

41 **Stanley J. Orloff**, the Petitioner, called as a witness for and on behalf of the Petitioner, upon being first duly sworn, testified as follows:

Direct Examination, by Mr. Caughlan.

Q. Will you state your name, please?

A. Stanley J. Orloff.

Q. What is your occupation?

A. Well, I was a psychiatrist prior—

Q. What is your present occupation?

A. Well, the present potential military occupational specialty is medical laboratory technician.

Q. Are you a private in the Army?

A. Yes, I am.

Q. Stationed at what place?

A. Stationed at Fort Lawton, Seattle, Washington.

Q. Dr. Orloff, will you state, please, what you are? You are a doctor of medicine?

A. That is correct.

Q. A graduate of what medical school?

A. Tulane University School of Medicine.

Q. Following your graduation from medical school, did you have internship residency?

A. Yes, I did.

42 Q. Where?

A. Well, I interned at Greenpoint Hospital, which is part of the New York City hospital system, and took residency at Creedmoor State Hospital, New York City.

Q. Following your degree, were you admitted to practice medicine in any State or States?

A. Yes. In Louisiana and in New York State.

Q. And did you actually practice medicine in either of those States?

A. Yes; in New York State.

Q. For how long?

A. For a period of four (4) years following internship.

Q. Will you state whether you had any specialty in your practice of medicine?

A. Yes. My full time, following internship, was devoted to psychiatry.

Q. At what institution was that?

A. Creedmoor State Hospital, first place. Full time during the day at Creedmoor State Hospital and then Creedmoor Institute for Psycliobiologic Studies, which was a research institution, and the LaFargue Clinic.

Q. In all those places were you practicing psychiatry?

A. That is correct.

Q. Do you have any specialty in your field relating to biologic or other studies?

43 A. Well, I participated in a research program which was set up by the New York State Department of Mental Hygiene inquiring into the cause, and technique of treatment, of

mental disorders. That was part of the work I was associated with.

The second part was to develop screening techniques for rapid screening of psychiatric treatments, different psychiatric treatments.

And the third was treatment of psychiatries, people who become mentally ill or insane.

Q. Following your induction into the United States Army, will you state whether you were stationed at Brooke Medical Replacement Center at Fort Sam Houston, Texas, for a time?

A. I was placed at the Station Medical Training Center at Brooke Army Medical Center, Fort Sam Houston.

Q. In connection with that did you have occasion to determine the qualifications, or requirements, in the Army for persons qualified potentially in their military occupational specialty as laboratory technicians?

A. As medical laboratory technicians? Yes, to this extent. I know it does not require a physician's background, and does not require a pre-medical background, and does not require college background, and it doesn't require an officer, but that is stated in the grades in which one can practice this specialty—military occupational specialty.

Q. Do you know what is required with reference to period
44 of time of training upon completion of basic training by an ordinary enlisted man in order to be assigned the potential military occupational specialty of medical laboratory technician?

A. To the best of my knowledge anyone who completes basic training may be assigned to a course in the school at Brooke Army Medical Center and, in a course of three (3) or four (4) months, no longer, be trained to do this work without any previous medical background.

Q. I hand to you what has been marked and received in evidence as Respondent's Exhibit Number 4. I will ask you to examine that, please. Did you examine that when we were outside?

A. Yes, I did.

Q. Before we came in? Attached to the—

The Court: What is the number of that exhibit?

Mr. Caughlan: Exhibit Number 4, your Honor.

By Mr. Caughlan: Q. Attached to the first two (2) pages of that, which set forth the specifications for this classification, is an extended description of the type of work done by laboratory technicians.

As a graduate of some medical school, Doctor, and some four (4) years practice, are you in a position to discuss the skills required for the performanee of that work?

A. Well, I believe I am. What it actually is, as the specialty implies, is the work of a technician, which means that these people are trained in certain technical procedures, which, again,
45 does not involve any medical experience or medical knowledge other than how to perform a given test.

In other words, they study the directions for these various tests. They may, say, pour a certain amount of fluid in this tube; heat this specimen over a flame; may study the criteria for interpretation of a particular test, whether plus one (1), plus two (2), or whether it does or does not precipitate.

In other words, the point I am trying to make is that it does not require, certainly, a doctor's work; and somebody can, without any medical experience, be trained to perform these procedures.

It is somewhat analogous to a filling of a prescription by a pharmacist, but it doesn't even require that much training.

That is to the best of my knowledge.

Q. Is it your opinion, Doctor, that it requires—Do I understand your opinion is that it does not require the skills which a doctor would have, or anywhere near those skills; is that correct?

A. That is correct.

Q. And did I understand that persons are qualified in that classification after four (4) months of training following their basic training?

A. Yes. That, I say, is to the best of my knowledge. I don't believe it is any longer. Perhaps Colonel Craig can tell us about that.

Q. Now, are your skills as a doctor utilized in the performance of work as a medical laboratory technician?

46 A. I don't believe so. It would apply to all doctors.

Q. I should say to one skilled, or anyone skilled, as a doctor utilized?

A. None, other than to be classified as a laboratory technician; really, no; and particularly with specialty training.

Mr. Caughlan: You may examine.

Before concluding with the witness, I believe that the other facts concerning his actual use in the Army are agreed to so that this is the only matter we are concerned with.

You may examine.

Cross Examination, By Major Hillis.

Q. Do you have within your professional ability the skill described in the specifications for a medical laboratory technician?

A. Within the many; yes.

Q. Well, are there any of the skills, or abilities, described in the specifications for a medical laboratory technician which you do not possess?

A. I can answer this in two (2) ways, if it please your Honor. One is that any doctor, in the course of his training, and in the course as an intern, at one time or another learns how to perform and execute these tests.

After he is out of internship he can never do it as well as somebody who is a laboratory technician who has great facility in pouring these fluids and doing these things, and, particu-
47 larly in my case with four (4) years since internship involved in psychiatry.

I would have to brush up on these procedures. I could do it, certainly, but it would take some effort to go back and do these things.

Q. Would it be a much simpler task for you to acquire—refresh your knoweldge—of these skills than it would be to train a new man?

A. I would think about the same.

Q. In other words, you believe now as a doctor of medicine it would still take you four (4) months to acquire these skills?

A. Well, I would understand perfectly the nature of these tests and the theoretical basis for them, but in terms of being able to perform rapidly these tests—perhaps Colonel Craig could bear me out—it would take some amount of time; whether two (2) or four (4) months, I don't know, but, it would take time to learn the procedure.

Q. But you don't deny that you do have the ability to perform these duties as a medical laboratory technician?

A. I do not deny it.

Q. You do have them?

A. Yes.

Q. You do have that ability?

A. I hope so.

Q. And the only reason that you have not exercised this ability in this field is the fact that you have not received a permanent assignment; is that true?

48 A. In the field as a medical laboratory technician?

Q. Yes, sir.

A. Yes, sir; I believe so.

Major Hillis: I have no further testimony.

Mr. Caughlan: Just one more question, Dr. Orloff.

Redirect Examination, By Mr. Caughlan.

Q. Are the skills which are set forth there, the techniques and tests which are discussed in the documents, those which are ordinarily performed by a practicing doctor of medicine?

A. These tests?

Q. Yes.

A. Not ordinarily, particularly with reference to the vast majority of these tests.

I saw some—for example, there are, I would say almost, well, over one hundred (100) tests mentioned here, and the ordinary doctor of medicine might, and not often, perform the urinary analysis, which is simple, and, oh, some will do their own blood counts, but I don't think, apart from those, an ordinary physician will do these tests.

Q. In the ordinary practice of medicine, Doctor, what type of person are these tests performed by?

A. They are done through commercial laboratories, or city laboratories where trained technicians do them.

Q. Is it true that the performance of this type of work re-
49 quires certain manual skills and familiarity with certain more or less mechanical procedures?

A. Yes.

Mr. Caughlan: I have no further questions.

Major Hillis: I have no further questions.

Mr. Caughlan: You may step down.

(Witness excused.)

Major Hillis: Colonel Craig, would you be sworn?

The Court: That is the extent of your testimony?

Mr. Caughlan: Yes, your Honor. We understand that everything else pertinent to the case is substantially agreed to.

Is that your understanding?

Major Hillis: That is my understanding.

50 **Allan A. Craig.** called as a witness for and on behalf of the Respondent, upon being first duly sworn, testified as follows:

Direct Examination, By Major Hillis.

Q. Will you tell the Court your name, your grade and your present organization?

A. Colonel Allan A. Craig, Medical Corps, United States Army Hospital, Fort Lawton, Washington.

Mr. Belcher: May we say, if your Honor please, Colonel Willoughby is here in response to the order to show cause.

Will you stand up, please, Colonel Willoughby?

(Whereupon, Colonel Willoughby arose and then resumed his seat.)

By Major Hillis: Q. How long have you been stationed at Fort Lawton, Colonel Craig?

A. Just approximately slightly over three (3) months, sir.

Q. And before that time what was your assignment?

A. Commanding Officer, Osaka General Hospital, Osaka, Japan.

Q. And before that were you at any time stationed at the medical training center at Fort Sam Houston?

A. Not at the Medical Replacement Training Center at
51 Fort Sam Houston, no sir.

Q. What were you?

A. Deputy Commander, Brooke General Hospital, Fort Sam Houston.

Q. Are you acquainted with the specifications for the medical specialty number 3858, medical laboratory technician?

A. Yes, sir.

Q. Will you tell the Court, in your own way, Colonel Craig, the process employed by the Army in training its medical laboratory technicians and the time required to do it?

A. In training a medical laboratory technician he first receives basic training, which is common to all soldiers, then special training in the performing of laboratory tests under supervision. The time of that training runs approximately two (2) or three (3) months, about two (2) or three (3) months, and he performs the tests at that time under supervision to see that he gets them correct and is able to use text books, or memoranda, to help refresh his memory as to the detailed performance of the test, most of which he learns in doing but some he doesn't do very often.

Q. With respect to the need of the Army for this particular specialty work, are you acquainted with the current condition, current demand, for this particular specialty?

A. I think so.

Q. And what is that demand?

A. Medical laboratory technicians are used in every hos-
52 pital in the Army, about six (6) or seven (7) in a two hundred (200) bed hospital; in a one hundred (100) bed hospital there would be, approximately, three (3). Larger hospitals, of course, would use more. They are used in all hospitals.

Q. In your experience, does the Army now have an adequate supply of trained medical laboratory technicians?

Mr. Caughlan: I think, your Honor, I would object to that unless there is some showing, beyond the present showing, as to his qualification to answer that.

The Army of the United States is a pretty large organization and I think this would require some statistical or special knowledge.

I have no particular objection to it being continued but question the value.

Major Hillis: I limit his answer to the extent of his experience.

The Court: He may answer, if he knows.

A. I couldn't say as to the over all needs of the Army. At the hospital at Fort Lawton I am authorized seven (7) and I have seven (7) laboratory technicians.

Q. And has that been true with respect to each of the other assignments that you have had?

A. Yes, generally speaking. It fluctuates up and down.

Q. Do you train every soldier, or every soldier who thinks he wants to be a medical laboratory technician, in that field; or
53 must they possess some fundamental qualification, or aptitude?

A. They don't have to possess any fundamental qualification or aptitude, although we try and train all soldier in what duty they perform, if possible, and in what they do show aptitude in. We do test them for that but it is not always true that they get their preferment.

Major Hillis: I have no further questions.

Mr. Belcher: Just a minute.

Major Hillis: Just a minute.

(Whereupon, there was a discussion between Counsel for Respondent.)

By Major Hillis: Q. Would a doctor of medicine in the Army as a private be required to go through the training for a medical laboratory technician before he would be allowed that specialty?

A. Not always. I try and give it to every laboratory technician. However, some laboratory technicians are trained in the hospital where they are working, on the job training in that type of work, and upon passing the necessary tests are allowed that medical occupational specialty.

Q. Would a doctor of medicine have the professional skills and abilities covered by this specialty?

A. Generally speaking he would. He might have to brush up on it a few weeks, but he would have them.

Major Hillis: You may cross examine.

54 Mr. Caughlan: I have no questions, your Honor.

The Court: That is all.

(Witness excused.)

Colloquy Between Court and Counsel

Mr. Belcher: That is our case.

The Court: It is now twelve (12:00) O'clock. I assume that the balance of the matter will be a question of argument.

Mr. Caughlan: I think that is true.

The Court: There appears to be no reason why Colonel Willoughby should remain or come back, unless he desires to.

Mr. Caughlan: I can see no reason.

The Court: Or Captain Lines. There is no reason for him to return. I think the matter has been dismissed as to him anyway.

Mr. Caughlan: We asked for that.

While we are thinking of that, Mr. Belcher and Major Hillis said there was no objection on their part to the amendments to the pleadings this morning.

Mr. Belcher: That is correct.

Major Hillis: That is correct.

Mr. Caughlan: That applied both to the dismissal of Captain Lines, which the Court passed on, and the amendment of paragraph ten (10).

The Court: Will you restate that for the record?

Mr. Caughlan: Yes. Just a moment.

Paragraph ten (10). It was orally moved to amend to
55 read as follows:

"The Petitioner has requested of the appropriate authorities and officers of the Army of the United States that, in view of their refusal to permit him to serve as a doctor . . ."

The words:

" . . the appropriate authorities and officers of the Army of the United States . . "

to be substituted for the words:

" . . the respondents . . "

Mr. Belcher: No objection to that, your Honor.

The Court: That amendment may show.

* * * * * * * * * * * *

57 The Court: Are we ready to proceed Mr. Caughlan?

Mr. Caughlan: Yes.

Before proceeding I wanted to clarify and I have just discussed it with Major Hillis, the state of the record as to this stipulation, and, in order that there may be no misunderstanding, may I repeat what Major Hillis and I discussed, your Honor?

The Court: You may.

Mr. Caughlan: It is stipulated, as we understand, between the parties, with respect to administrative remedies and the record of the Petitioner, that the matters of fact set forth in the affidavit of Petitioner designated as "Traverse" may be taken as true.

It is further stipulated that no written application, or application of any kind, has been taken for discharge pursuant to paragraph 315—

Major Hillis: Three (3) (d).

Mr. Caughlan: Paragraph 3 (d) of Regulations 615-365.

The Court: That is Exhiblt Number 1, Army Regulations?

Major Hillis: Yes, sir.

Mr. Caughlan: Yes, your Honor.

Then we say, to any officer or authority competent to give discharge under that regulation.

58 Now, that is, I think, our understanding of the state of the record at the present time and both parties so stipulate. Is that correct?

Major Hillis: That is my understanding, your Honor.

The Court: The record may so show.

Mr. Caughlan: And that being the case, your Honor, there is no further evidentiary matters to be offered on behalf of the Petitioner.

The Court: Now, may I inquire as to this:

The Court during the Noon Hour hurriedly reviewed the exhibits. With reference to Exhibit Number 1, a regulation referring to the application for discharge, namely section 3 (d), that refers to cases where there has been some question raised as to the procedural aspects of the induction, and that is the only part of that regulation that you state is applicable?

Major Hillis: Yes, sir.

The Court: Do I understand, Mr. Caughlan, that you contend that there was any procedural question?

Mr. Caughlan: That is correct, your Honor.

The Court: To the Petitioner's induction?

Mr. Caughlan: We make no claim that he was improperly classified, or otherwise denied any procedural relief to which he was entitled up to the time of his induction.

The Court: That narrows the issue then.

59 You contend then, Mr. Caughlan, that the applicable section, which is referred to as section 454 sub-section (a), under which this Petitioner was inducted, does not permit his retention in the Army in the capacity as a private.

Mr. Caughlan: It is our contention, your Honor, that this section, as applied in this instance to this case, does not permit his detention in the Army under the circumstances that exist as shown by the facts in this case.

That is our contention. That, as a question of law relating to the—

The Court: It now becomes a question of law.

Mr. Caughlan: Yes, sir.

The Court: And do you wish to proceed with the argument?

Mr. Caughlan: Yes. If I may have just a moment; I wanted to organize one thing here.

The Court: Now, as to argument, Mr. Caughlan will open, and you (Major Hillis) will respond, and you (Mr. Caughlan) will have a short rebuttal.

60 (Whereupon, argument was had as indicated by the Court and the following proceedings were then had, to-wit:)

Ruling of Court

The Court: I believe the Court is in a position to rule at this time.

First of all, the Court will say that he feels that the Petitioner here is clearly within his rights in coming into Court seeking a writ of habeas corpus to determine his status.

The question is one which is not free from doubt and there is no other method whereby he may determine whether or not he is legally held in the Army.

The facts in this matter have been agreed upon, and appear from the pleadings, exhibits and stipulations of Counsel.

The Court has sought by some independent research, anticipating the questions that might arise in this case, to determine the law applicable and has come to a conclusion as to the law.

The only questions that may be determined by this Court in this matter is whether the Petitioner has had due process of law in being inducted into the Army, and, whether having been lawfully inducted, he is being retained in the Army in compliance with the law.

The Court has no authority to review the action of the Army in making classification of or assigning its personnel, and no question is raised as to compliance with law or procedure by his draft board or other agencies in inducting the Petitioner into the Army.

The question appears to the Court to be clearly one as to whether a doctor, a medical doctor, may be inducted under the stat-

61 ute involved and be retained in the Army regardless of whether he is given a status as a doctor, which it appears can be given, under the stipulated facts, only when that person is a commissioned officer.

It would appear from pertinent excerpts from Congressional hearings and debates that the purpose of the law was to encourage and to bring into the Service more doctors who were seriously needed.

As far as the Court is concerned, it is clear from the nature of the questions and responses in those Congressional hearings that the law itself does not require that the person, or doctor, drafted under the Act must serve as a doctor.

The questions put by the members of the committees, and the responses thereto, indicate that the Army "intended", "proposed", or "hoped" to do certain things, but the law itself did not require that the Service do so. If the law covered the situation, there would have been no occasion for the questions.

Now, this is a rather anomalous situation where a person seeking a commission was granted a commission and then had it taken away before he was inducted. It is not for the Court to say whether such action was proper or not, and the Court must assume that the Armed Forces acted properly in that matter.

Having no commission, the Petitioner finds himself in service as an enlisted man and has been unable to secure a commission since his induction.

62 There is indication that a commission may eventually be granted the Petitioner, but it is the Court's interpretation of the law that, even should the Army deny that commission, the Court could not require, or compel, any action insofar as the Armed Forces are concerned.

Therefore, as the Court interprets the law, a doctor inducted under the statute applicable is in the service in the same status as he would be had he been inducted under other applicable statutes, and whether he is used in a medical category or not.

Respecting whether or not such interpretation would render the law unconstitutional, it is the Court's belief that it would not do so.

The classification as to doctors is a reasonable one in view of the demand in the Armed Forces for doctors and, undoubtedly, the law was passed for the purpose of securing, one way or another, greater medical personnel.

It is quite possible that it has served to operate, as indicated in the Congressional hearings, to compel doctors to seek commissions and get into the Service rather than take the chance of being drafted and possibly serving as an artilleryman, or infantryman, should he be so drafted.

So that is the ruling of the Court and the writ will be denied.

Proceedings in the United States Court of Appeals for the Ninth Circuit

66 UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 13,248

STANLEY J. ORLOFF, *Appellant*,

vs.

REX E. WILLOUGHBY, Colonel, United States Army, *Appellee*.

Appeal from the United States District Court for the Western District of Washington, Northern Division.

Opinion—March 13, 1952

Before: ORR and POPE, Circuit Judges, and GOODMAN, District Judge.

ORR, Circuit Judge:

Appellant petitioned for a writ of habeas corpus. The petition was denied. He appeals. Appellant is a medical doctor, specializing in psychiatry. On July 26 1951 he was inducted into the armed forces as a private by authority of the so-called "Doctors Draft Law," Public Law 779, 81st Cong., 2d Sess., 1950 U. S. Code Congressional Service 3641. The statute grants the President of the United States authority to " * * * require special registration of and; on the basis of requisitions submitted by the Department of Defense and approved by him, to make special calls for male persons qualified in needed—(A) medical and allied specialist categories who have not yet reached the age of 50 at the time of registration * * * Persons called hereunder shall be liable for induction for not to exceed twenty-one [now 24] months of service in the Armed Forces." Public Law 779, 81st Cong., 2d Sess. § 1. Thus, while under the terms of the general draft law, Selective Service Act of 1948, persons over the age of 26 are not eligible for induction, 50 U.S.C.A. App. § 454(a), as amended by Public Law 779, doctors, dentists and allied specialists, in contrast with the general population, may be inducted up to the age of 50. Appellant was over the age of 26 at the time of his induction. Prior to the date of his induction, upon advice of the Selective Service System, and to avoid being inducted under the Act,[1] appellant applied for and was granted a commission as a captain in the Medical Corps, United States Air Force. However, his commission was revoked on July 24, 1951, two days before the date of his scheduled induction, because of his failure to execute certain Air Force forms dealing with his commission application.

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[1] The Act, § 7, exempts members of the Reserves from induction.

Appellant is presently a private in the Army of the United States, assigned to and a member of Enlisted Replacement Center, Fort Lawton, Washington, for shipment to the Far Eastern Command. Since his induction the Army has given appellant a potential military occupational specialty (PMOS) of medical laboratory technician. Appellant has repeatedly requested the Army to assign him work as a medical doctor regardless of grade or rank, but has been informed that Army regulations permit only commissioned officers to practice as doctors. On December 10, 1951 appellant reapplied for a commission and his application is now pending. Upon being informed that it would take from six months to a year before his application was finally passed upon, and the Army being unable, because of his non-commissioned status, to use him as a doctor in the interim, appellant brought his petition.[2] His initial attempt to secure release from the Army was in the District Court for the District of Columbia. The petition was there dismissed for lack of jurisdiction. Orloff v. Lovett, 101 F. Supp. 750 (D.C.D.C. 1951). Upon arrival at Fort Lawton the present
68 proceeding was instituted and the District Court ruled on the merits adversely to appellant.

The fundamental question before us is one of statutory construction. Appellant urges that a doctor inducted under the Act must be used as a doctor in the armed services, that such requirement is mandatory under the Act, and that since his induction was for the one purpose only, if the Army cannot or will not give him such work, he must be discharged. His interpretation is based on the premise that the purpose of the Act was to enable the armed services to secure needed medical, dental and allied specialists without unnecessarily depleting the short supply of such civilian persons, and that consequently to draft a doctor and use him in another capacity is directly opposed to congressional intent because (1) the civilian supply is depleted, and, (2) the military demand remains unsatisfied. To give to the statute any other construction, argues appellant, would render it unconstitutional. That the primary purpose of drafting doctors, not otherwise subject to induction, was to supply the armed forces with needed specialists in this category, is apparent. Certainly, that was the ground on which

2 There is nothing in the record to indicate that appellant's present application for a commission will be looked upon by the Armed Forces more favorably than his first such application. The Army may take a year to finally act on the application and, if so, appellant will have served almost three-fourths of his induction term before being accepted or again rejected for a commission. In the interim, according to appellant's claims, he will be forced to serve in a capacity violating the statutory command, or in pursuance of an invalid statute. Under these special circumstances we do not think that this action is prematurely brought insofar as it may be argued that appellant should await action on his application for commission.

the bill was justified to Congress by the military. And it also seems apparent that Congress contemplated that inductees under the Act would normally be utilized in their professional capacities. A reading of the debates in Congress is replete with references to such a congressional understanding and desire. See, 96 Cong. Rec. 13857, 13859. On the other hand, we have for decision the question of whether Congress enacted its understanding and desire into positive law and made such particular use of professional inductees mandatory upon the military.

The case was argued and briefed before us by appellee on the broad theory that, under the statute, doctors could be drafted and used for any purpose the Army saw fit; that the matter of duty assignment for such inductees was simply a matter of military discretion. In response, appellant urges that such a construction renders the Act subject to constitutional attack as unreasonable and discriminatory class legislation. We find it unnecessary to decide the constitutional question. The appellant is not being utilized in a capacity wholly outside the medical field. While it is true that under Army regulations he cannot practice medicine as such, he is nevertheless being employed in a type of work for which his medical training renders him peculiarly adaptable. There are many specialized duty assignments within the Armed Forces which require the performance of tasks well within the competence of doctors due to their extensive medical training. Such assignments may well be criticized as wasteful because not utilizing the inductee's capacities to the full level of his ability, but they are nevertheless within the area of his special competence. We think that a construction that the military may make such duty assignments is as far as we need go in this case. Such a construction, because of the clear relationship between the special class of inductees and the work they may be required to perform, removes the constitutional question from the case.

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The words of the statute, in terms, do not require appellant's construction that a particular type of work alone can be assigned to inductees. Nor do they, in terms, require that a commission be granted inductees. On the contrary, it may well be urged that the words used will not bear the meaning which appellant seeks to impress upon them. The Act is written in the form of an amendment to the Selective Service Act of 1948, and seems merely, by acting within the framework of the general law, to describe additional classes of men eligible for induction under the latter statute. There is nothing to indicate that men inducted under this new section of the draft law are to be treated, after entrance into the armed forces, differently from men inducted under other provisions. It is significant that when Congress intended a class of

registrants to be used in a particular manner, as in the case of conscientious objectors, it designated the type of work to which such persons should be assigned in the Armed Forces. See 50 U.S.C.A., App. § 456(j). We do not think that the words of the statute preclude the Army's present utilization of appellant.

The legislative history of the Act bears out this construction. Congress was deeply concerned over the use that would be made by the Armed Forces of inductees, and that the military should not waste their talents. Justification for the bill as written, and the allaying of congressional fears was accomplished by assurances from the military that men inducted under the Act would be used in their professional capacities. See "Hearings before
70 House Armed Services Committee on H. R. 9554, 81st Cong., 2d Sess. 7164, 7174, 7176. These assurances were in turn used as arguments for passage of the bill during the debates. 96th Cong. Rec. 13857. The necessity for such reassurances implies a congressional recognition that as written the bill simply described a new class of persons eligible for induction, and did not make mandatory use of the inductees strictly in their professional capacities. We think Congress passed the bill in the form it did relying upon the good faith of the military's representations that professional talents of the inductees would be effectively utilized. Appellant having been given a duty assignment within what we find to be the minimal permissible area, we are without power to control the exercise of military discretion.

Problems of a nature similar to that presented by this case were discussed before Congress. Representatives of the American Medical Association and American Dental Association were concerned that men might be inducted under the Act before their applications for commissions were acted upon. Accordingly, they proposed that the bill provide for deferment of induction of men who had pending applications and, in addition, that a provision be placed in the law prohibiting induction of men who had been refused commissions by the Armed Forces. See Hearings before Subcommittee of Senate Armed Services Committee on S. 4029, 81st Cong., 2d Sess. 11, 19, 21. The representatives of the American Dental Association criticized the Senate Bill (which for our purposes may be treated as the bill that was actually passed) by saying that it did not " * * * provide a mechanism for commissioning at least the medical and dental personnel who might be inducted * * * although if such personnel are [not] commissioned it would be difficult to utilize their professional services to the maximum extent under the existing corps system." Id. at 21, and see House Hearings, supra, 7199. At another point the American Dental Association representative asserted: "It is the con-

viction of the American Dental Association that professionally trained men should be used in their professional capacities. If it is not possible for the Armed Forces so to utilize such personnel, then, * * * it is better that the professional skill of such person be made available to the civilian population." Id. at 24. A bill was introduced in the House and died in committee which
71 prohibited induction of registrants until they had been tendered a commission. See Hearings before House Committee on Armed Services, supra, 7206. It was recognized that a man could not be inducted into a commissioned status but would have to be drafted as a private. General Robinson, Surgeon General of the Army, testified before the House Committee that upon being drafted it would be Army policy to tender a commission to the inductee, but that it could be done only if he would accept it. Representative Kilday asked: "If he would not accept it he would remain on as an enlisted man?" General Robinson replied: "That is correct." Hearings before House Committee on Armed Services, supra, 7164. Congress then was not unaware of the problems that might arise in the case of men inducted, necessarily as privates, under the Act. Yet, as eventually adopted, the bill bears silent witness to the rejection of legislative proposals specifically designed to deal with such situations. It seems apparent, however, that the induction of a doctor without the tendering of a commission is and will continue to be a very exceptional case indeed. The Medical Corps of the Air Force in this case went out of its way to have appellant commissioned before induction, by postponing certain requirements in order to accomplish this. It was appellant's refusal to comply with regulations that resulted in his commission being revoked. Appellant cannot be said to be without fault in causing the situation in which he now finds himself. Nor is the Army to be censured in this particular case. It found itself with an inductee sent by the Selective Service Board, which it could not, because of regulations, use as a doctor in a full sense. We have not been advised as to how the Army could legally discharge the inductee under such circumstances. It has him on its hands and is using him in a capacity employing some of his skills. We see no more it could do.

The judgment is affirmed.

GOODMAN, District Judge, concurring:

I concur in the result, because I believe that the "Doctors Draft Law" was administered fairly by the Military and in accordance with Congressional intent, as to appellant. He was com-
72 missioned. The commission was revoked because of *his* re-

fusal to comply with regulations. This fully justified the denial of the writ by the Court below.

I do not agree with the court's view that the statute permits the military to make any duty assignment to a drafted doctor within a "minimal permissible area." It seems to me that this holding is not necessary for decision in this case. Since it has been made the basis of decision, I cannot agree to it.

In my opinion, Congress did not leave to the military the power to fix the duties of a drafted doctor within some general undefined limits. For if that be so, then a drafted doctor, for example, could be put to work by the military, cleaning sponges or instruments in an operating room, upon the theory that such work has a reasonable relationship, within a "permissible area," to medical services.

In my opinion, Congress intended that a drafted doctor should be a doctor in the military service, unless his own refusal prevents. Otherwise he should be discharged and returned to civilian medical status.

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73 IN UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 13248.

STANLEY J. ORLOFF, *Appellant*,

vs.

REX E. WILLOUGHBY, Colonel, United States Army, *Appellee*.

Judgment—March 13, 1952

Appeal from the United States District Court for the Western District of Washington, Northern Division.

This cause came on to be heard on the Transcript of Record from the United States District Court for the Western District of Washington, Northern Division, and was duly submitted.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this court, that the judgment of the said District Court in this cause be, and hereby is, affirmed.

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74 IN UNITED STATES COURT OF APPEALS

Order Denying Petition for Rehearing—April 17, 1952

Upon consideration thereof, and by direction of the Court—Goodman, District Judge dissenting—IT IS ORDERED that the petition of appellant, filed April 12, 1952, and within time allowed

therefor by rule of court, for a rehearing of above cause be, and hereby is denied.

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75 Clerk's Certificate to foregoing transcript omitted in printing.

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76 IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1952

* * * * *

Stipulation as to Record—November 14, 1952

Subject to the approval of this Court, it is hereby stipulated and agreed by and between counsel for the respective parties that in printing the record in the above-entitled case the following portions of the record may be deleted:

1. All of that portion of Volume I following line 5 of page 28.
2. The following portions of Volume II:

a. Page 1, line 19, through page 2, line 7, inclusive.
b. Lines 8 and 9 of page 2 with the exception of "THE COURT."
c. Page 30, line 10 through page 40, inclusive.
d. Page 55, line 15 through page 57, line 2, inclusive.
e. Last three lines of page 62.
f. Page 63 through page 65, inclusive.
g. Page 75.

77 It is further stipulated that the parties may refer in their briefs and arguments to the portions of the record not printed.

DAVID REIN,
Counsel for Petitioner.

ROBERT L. STERN,
Acting Solicitor General,
Counsel for Respondent.

Dated: November 14, 1952.

78 SUPREME COURT OF THE UNITED STATES

* * * * *

Order Allowing Certiorari—November 10, 1952

On consideration of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is transferred to the appellate docket as No. 444.

It is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

November 10, 1952.

Petition for Writ of Certiorari Not Printed

BRIEF FOR PETITION-ER

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 444

STANLEY J. ORLOFF,

Petitioner,

vs.

COLONEL REX E. WILLOUGHBY, COMMANDANT OF FORT LAWTON, SEATTLE, WASHINGTON

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR PETITIONER

Opinions Below

The opinion of the Court of Appeals is reported at 195 F. (2d) 209. The opinion of the District Court is reported at 104 F. Supp. 14.

Jurisdiction

The jurisdiction of the Court rests on 28 U. S. Code Section 1254. The petition for a writ of certiorari was granted on November 10, 1952 (R. 51).

Statutes Involved

50 App. U. S. Code, sec. 454(a) provides in part as follows:

> No person, without his consent, shall be inducted for training and service in the Armed Forces or for training in the National Security Training Corps under this title, except as otherwise provided herein, after he has attained the twenty-sixth anniversary of his birth.

Public Law 779, 81st Cong. 2nd Sess. provides in part as follows:

> Notwithstanding any other provision of this title . . ., the President is authorized to require special registration of and, on the basis of requisitions submitted by the Department of Defense and approved by him to make special calls for male persons qualified in needed—
>
> (A) medical and allied specialist categories who have not yet reached the age of fifty at the time of registration, and
>
> (B) dental and allied specialist categories who have not yet reached the age of fifty at the time of registration.
>
> Persons called hereunder shall be liable for induction for not to exceed twenty-four months of service in the Armed Forces.

This portion of the statute appears in the U. S. Code as 50 App. U. S. Code, sec. 454 (i)(1).

Statement of the Case

The petitioner, Dr. Stanley J. Orloff, is a private in the United States Army. He is married and has two children. He holds a degree of doctor of medicine and is duly licensed to practice medicine in the States of Louisiana and New York. Prior to his induction into the United States Army,

he was actively engaged in the practice of medicine, specializing in psychiatry at Creedmor State Hospital, New York City, New York. He was also engaged in psychobiologic studies for the Institute for Psychobiologic Studies, New York Department of Mental Hygiene (R. 2, 23, 32-34).

The petitioner was inducted into the Army on July 26, 19 , after he had passed his twenty-seventh birthday. Although over the twenty-six year age limit for the regular draft, 50 App. U. S. Code, sec. 454 (a), the petitioner was drafted in accordance with the provisions of 50 App. U. S. Code, sec. 454(i)(1), which authorizes the drafting of medical doctors who are under the age of fifty (R. 2, 5-6, 22-23). On July 5, 1951, prior to petitioner's induction as a private, he had been granted a commission as a Captain in the Medical Corps, U. S. Air Force, but this commission was revoked on July 24, two days prior to his induction (R. 11, 30-1).

The regulations and practice of the United States Army provide that an individual can serve as a doctor of medicine in the United States Army only if he holds a rank as a commissioned officer (R. 2, 8-9, 23-24). Subsequent to his induction, petitioner applied for a commission, so that he might be employed as a doctor in the army in accordance with the provisions of the statute under which he was inducted (R. 2, 23-24). The petitioner completed the application form for commission including a required loyalty certificate. The form required a statement as to petitioner's membership, association or connection in any manner with any of the listed organizations designated by the Attorney General pursuant to Executive Order 9835. (see *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123). Petitioner answered that he had attended meetings or classes of certain of the organizations listed, but claimed his federal constitutional privilege as provided for in the form with regard to his connection with other

organizations. He concluded his statement as follows: "However, I have never considered myself an organizational member of any of the aforesaid." (Exh. 2, pp. 10-12).

Petitioner was finally advised that it might take from six months to a year before the application for a commission could finally be acted upon. He thereupon requested a discharge while the Army had his application for a commission under consideration, but this request was denied (R. 3, 13). Subsequent to the hearing in the District Court, his application for a commission was formally denied by the Army.

Petitioner was classified by the Army ("potential military occupation specialty") as a medical laboratory technician (R. 6.) This classification does not require or utilize any of the petitioner's training and experience as a doctor; men with no previous training or experience of any kind are assigned to this classification after approximately two to three months training in the army. Petitioner had himself, prior to being assigned to this classification, received the same training in preparation for it as was usually given to a high school graduate (R. 34-39).

Petitioner, contending that his retention in the army under these circumstances was unauthorized and in violation of the applicable provisions of the Selective Service Act, sought to obtain his release from the army by writ of habeas corpus.

Petitioner first filed a petition for a writ in the United States District Court for the District of Columbia. The petition, however, was dismissed for lack of jurisdiction. *Orloff* v. *Lovett*, 101 F. Supp. 750. The petitioner was then transferred to Fort Lawton, Seattle, where he instituted the present action (R. 6-7).

After a hearing upon the merits, the District Court denied the writ. The District Court held that although the petitioner had been drafted under a special provision authorizing his induction solely because he was a doctor, his status

was the same as any other inductee. The District Court said: "Therefore, as the Court interprets the law, a doctor inducted under the statute applicable is in the service in the same status as he would be had he been inducted under other applicable statutes, and whether he is used in a medical category or not." 104 F. Supp. at 16. The District Court added that it saw no constitutional objection to this construction of the statute.

On appeal, the Court of Appeals affirmed the District Court, but its reasoning was different. The majority of the Court found that the petitioner "is not being utilized in a capacity wholly outside the medical field." It held that the act drafting doctors solely because they were doctors and admittedly for that purpose "did not make mandatory, use of the inductees strictly in their professional capacities," and concluded that the petitioner "having been given a duty assignment within what we find to be the minimal permissible area, we are without power to control the exercise of military discretion." 195 F. (2d) at 211.

Judge Goodman originally concurred in the decision of the Court of Appeals on the mistaken view that petitioner's failure to obtain a commission was due to his refusal to comply with regulations. He specifically disagreed, however, with the reasoning of the majority, stating as follows:

> In my opinion, Congress did not leave to the military the power to fix the duties of a drafted doctor within some general undefined limits. For if that be so, then a drafted doctor, for example, could be put to work by the military, cleaning sponges or instruments in an operating room, upon the theory that such work has a reasonable relationship, within a 'permissible area,' to medical services (195 F. (2d) at 213).

On petition for rehearing Judge Goodman changed his concurrence to a dissent, stating that "due process under the 'Doctors Draft Law' requires the Army to use appellant

as a doctor or return him to civilian life." 195 F. (2d) at 213.

Upon application by petitioner, Mr. Justice Douglas, in order to protect the jurisdiction of this Court on review, granted a stay against the removal of petitioner from the control and custody of the respondent pending the timely filing and disposition of the petition for certiorari. Subsequently, upon the application and representation of the government that the respondent herein would maintain his control and custody of the petitioner, Mr. Justice Douglas modified this stay order to permit the petitioner's assignment anywhere within the United States provided that respondent's control and custody of the petitioner would not be disturbed.

Specification of Errors

The court below erred in affirming the judgment of the trial court because:

(1) The statute which authorized the petitioner's induction into the armed services requires that the petitioner be utilized as a doctor.

(2) The record shows that petitioner is not being utilized as a doctor, as required by the statute which authorized his induction.

(3) The statute as construed and applied by the courts below constitutes an unreasonable discrimination against doctors as a class, in conflict with the Fifth Amendment.

(4) Upon the record and the law the petitioner is entitled to an order discharging him from the Army.

ARGUMENT

I. *The Issue in the Case*

The statute which furnishes authorization for the induction of the petitioner, Title 50 App. U. S. Code, Sec. 454 (i)(1), is by its terms an exception to the general provisions

of the draft act. It authorizes the President to "Notwithstanding any other provision of this title . . . require special registration of and, on the basis of requisitions submitted by the Department of Defense and approved by him, to make special calls for male persons qualified in needed . . . medical and allied specialist categories who have not yet reached the age of fifty at the time of registration . . ."

There is no question that apart from this exceptional statute, the petitioner was over age and not subject to the draft. Nor is there any question that he was subject to the provisions of this statute because he held a degree as a doctor of medicine, and that in the absence of such a qualification, he was not required to register under the statute.[1]

In our view, the authorization furnished by the statute permits the induction into the armed services of only those doctors or other medical or allied specialists whom the armed services need and utilize in their specialist categories. In other words, the authorization goes no further than the justification in terms of need. Simple common sense dictates that Congress did not authorize the armed services to go outside the regular age limits set by the draft in order to induct doctors so that these doctors might serve as infantrymen or company clerks or laboratory technicians or whatever else might come to mind.

Accordingly, if the armed services do not need, or for one reason or another do not choose to utilize, the services of a doctor drafted under this statute, it cannot thereupon determine to use him in some other capacity. The special authorization which empowered the armed services to take him from civilian life has ceased, and he must be released. The situation is no different than if the armed services retained a particular individual in the service without his consent beyond the time limit authorized by statute.

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[1] See Presidential Proclamation No. 2906, October 6, 1950, 15 F.R. 6845, and No. 2915, December 28, 1950, 15 F.R. 9469.

This interpretation, which is the only rational one that can be made of the statute, is fully borne out by the language of the statute, its purpose and legislative history,[2] the regulations issued to implement the statute, and its position in the overall statutory scheme.

II. *The Purpose of the Statute*

The statute here under consideration was made necessary by the nature of the existing draft program. The age limit in the present draft law, unlike that in the previous draft, is set at the low figure of twenty-six. With so low an age limit, the draft obviously could not bring into the service persons in certain needed specialist categories who, because of the years of training required to attain certain skills, would inevitably have reached an age above the twenty-six year limit. The clearest example of this class is doctors of medicine, relatively few of whom would fall under the age of twenty-six. Unquestionably, the armed services could not function properly without an adequate supply of physicians. As a result, the armed services found it necessary to make extensive calls on those doctors who had served in the last war and remained in the Reserves. But Congress believed it unfair to require those who had served once to serve again while others who had not served at all were still available. The present statute was enacted to meet this problem by authorizing the induction of doctors who are under the age of fifty.

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[2] The relevant legislative materials are: Hearings before Committee on Armed Services of the House of Representatives on H. R. 9554, No. 210, 81st Cong. 2d Sess.; Hearings before a Subcommittee of the Committee on Armed Services of the United States Senate on S. 4029, 81st Cong., 2d Sess.; H. Rep. 3015, 81st Cong., 2d Sess.; S. Rep. 2449, 81st Cong., 2d Sess.; H. Rep. 3039, 81st Cong., 2d Sess.; 96 Cong. Rec. 13855 to 13870, 81st Cong., 2d Sess. (House debate); 96 Cong. Rec. 13707 to 13712, 81st Cong., 2d Sess. (Senate debate).

Thus H. Rep. 3015, 81st Cong., 2nd Sess. p. 2, stated:

> The purpose of the bill is to provide the necessary authorizations through which the Armed Forces can meet the demands being made for additional personnel in the medical, dental, and allied categories to support the expanding forces without requiring the large-scale call to active duty without their consent of Reserve Officers who have had substantial periods of service in World War II.

The objectives and purposes of the statute and an analysis of its provisions are set out most fully in the statement on the bill made to the House of Representatives by Congressman Vinson, Chairman of the House Committee on the Armed Services (96 Cong. Rec., 13856-13857):

> . . . Mr. Chairman, the Army, Navy, and Air Force have a pool of 30,000 physicians and 12,000 dentists in their Reserve components who can be called to active duty.
>
> The problem here is to provide a fair and orderly system of priorities under which medical, dental, and related personnel will enter military service.
>
> It is in the best American tradition of fair play that those who have rendered little or no service, and who are otherwise qualified, should be the first to serve. There are a number of doctors and dentists who have given no service at any time. On the other hand, the vast majority of doctors and dentists now on the Reserve rolls have already served their country faithfully and with distinction.
>
> In an endeavor to furnish a more satisfactory solution to the problem, the bill now under consideration was introduced, which proposes to amend the Selective Service Act of 1948 in this regard.
>
> The bill authorizes the President to require the special registration of all male medical, dental, and allied specialist categories under the age of 45.[3] It

[3] The bill was amended, before final passage, to set the age limit at 50.

authorizes the induction of qualified individuals from this group and makes them liable for military service for a period not to exceed 21 months . . .[4]

Under the present provisions of Public Law 351, Eighty-first Congress, the Career Compensation Act, physicians and dentists who volunteer for active duty with the Armed Forces or the United States Public Health Service receive an additional $100 a month. Because of the wording of this legislation the Reserve officers and National Guard officers receiving orders to accompany their units on active duty are not eligible to receive the additional pay. This is indeed unjust. The bill, therefore, has been amended so as to permit these officers to qualify for such additional benefits, but persons inducted under the authority of the proposed legislation will not be entitled to the extra pay.

In order that the talent available to the Armed Forces in the fields of medicine, dentistry, and the allied sciences may be distributed efficiently among the three military services, the Secretary of Defense may now detail such personnel between the three services as required. Officers so detailed often desire to further their careers in the service to which detailed. The bill, therefore, authorizes the Secretary of Defense to effect these transfers under the following conditions: The individual officer must request the transfer himself; both the service from which he is to be transferred, and the service he is to enter must concur. Provisions are made for protecting the promotion, seniority, retirement, and leave rights and benefits of officers who are transferred under this authority.

I think that all Members of the House will agree that the comprehensive treatment which the bill gives to this important subject furnishes a satisfactory basis upon which the Congress can enact sound legislation.

---

[4] The statute was amended in 1951 to extend the period of service to 24 months.

> To sum up, we now have 6,226 doctors and 2,358 dentists on active duty in the armed services. By July 1, 1951, we will need a total of 11,250 doctors, and 5,000 dentists.
>
> Thus, it is our belief that this legislation will provide the means by which the armed services will obtain 5,000 more doctors and 2,650 more dentists.

Again and again throughout the hearings and the debates in Congress, Congress indicated that the purpose and intent of the statute was that doctors drafted thereunder be utilized as doctors and nothing else. A failure to carry out this purpose was described as an unwarranted invasion of the rights of doctors as well as an unnecessary injury to the civilian population which would be deprived of the doctor's services.

The same theme that doctors be utilized solely as doctors and that none be removed from the ability to serve civilians unless absolutely necessary for the armed services was stressed in the Congressional hearings by the representatives of the armed services who were the sponsors and proponents of the legislation, by other government officials, and by representatives of interested organizations such as the American Medical Association. The members of the Committees holding the hearings invariably shared these views.

Thus in the House hearings, during the testimony of John G. Adams, Assistant General Counsel, Office of the Secretary of Defense, Congressman Vinson said: "It is highly important that there be a National Advisory Committee, as a means of extending this down into towns, so that the civilian population can be served with doctors as well as the armed services" (7148-7149).

A prepared statement of Major General Raymond W. Bliss, the Surgeon General, United States Army, presented to both the House and Senate Committees, emphasized that the purpose of the statute was "to insure that our soldiers,

sailors, and airmen are given adequate medical care without, however, depriving our civilian population of a single physician or dentist who is not required in the active support of the military force of this Nation." (House Hearings, 7151; Senate Hearings, 47).

The following colloquy occurred during the testimony of Brigadier General Robinson, who appeared for the Surgeon General of the Army:

> Mr. Gavin: I would like to ask a question as to whether they expect to use the doctors to doctor or whether they will do a lot of paper work and take up their time with a lot of unnecessary things. Are they going to confine them to handling patients?
>
> General Robinson: We have worked strenuously since the war on a development of a Medical Corps to do the functions that the doctors should be doing.
>
> Mr. Gavin: To let the doctors do the doctoring?
>
> General Robinson: To let the doctors do the doctoring; yes, sir. (House Hearings, 7164.)

This same point was stressed again during the testimony of Dr. Richard L. Mieling, Director of Medical Services, Office of the Secretary of Defense:

> Mr. Kilday: Is it the purpose of the Department of Defense to adopt any regulation or policy that will see to it that the medical personnel are used for medical purposes and that the supply of doctors is conserved?
>
> Dr. Mieling: Yes. The Secretary of Defense has taken very active steps to assure that. (*Id.*, 7174.)
>
> * * * * * * *
>
> Mr. Kilday: Now, on the matter of the assignment of medical personnel to medical duty—a Member was showing me a letter that he received from one of his constituents, a doctor, who served in the last war, and he said that he had spent no more than 10 percent of his time in the service on medical duty. The balance of his time had been spent on boards, courts martial,

and administrative duty. Will there be a concentrated effort to put men from the medical service on jobs which do not require the professional training and skill of doctors and dentists?

Dr. Mieling: It is the policy of the Department of Defense that this shall be done, and, with that in mind, it is the policy of the Secretary of Defense that we will review the requirements and requests for the call up of medical officers in an attempt to increase the size of the medical service board to take care of these nonprofessional duties. (*Id.*, 7176.)

Dr. Walter B. Martin, testifying for the American Medical Association, endorsed the bill, but only on the assumption that doctors drafted under the bill would be utilized as doctors, a view that was shared by the Chairman of the Committee. Thus:

Dr. Martin: This bill provides a discriminatory call-up of physicians beyond the present draft age due to the special needs of the Armed Forces in the present national emergency that cannot be met otherwise. The American Medical Association supports this step but, at the same time, expects that the physicians who are required to serve will be assigned to duties which are essential to the war effort.

* * * * * * *

The Chairman: That is a very fine conclusion, and no doctor drafted should be assigned to do work that is not essential to the war effort. There are no two ways in the world about that. We should not put them in there just to be putting them in there to do something that has no direct bearing on the medical care of the men or their physical welfare.

Dr. Martin: Yes. We are accepting a discriminatory law, and we feel that we should be protected. (*Id.*, 7193).[5]

[5] Dr. Martin made the same point in his testimony before the Senate Committee (at p. 12).

During the hearings on the Senate side, Senator Gurney, o had introduced the bill in the Senate described its pur-se as follows:

> I feel that this bill does recognize the dual responsibility of Congress, first, in providing doctors for the military and, second, for keeping the necessary doctors for the civilian communities. (Senate Hearings, 15.)

The same theme was stressed in the debate on the House or.

> Mr. Scrivner: I find there is some misgiving in the minds of some Members as to the justice of picking out a certain class or a certain group of professional men to be taken in. I have received many letters from my boys and they are just as fine as any to be found anywhere. I am sure the chairman can say a few words of reassurance in the problem they present. It is this: During World War II there were skilled men, many specialists who were confined to merely routine desk jobs. They want to feel sure that if these men are taken in that their skill in their profession will be used and that their time will not be wasted warming a chair. Was that question gone into?
>
> Mr. Vinson: That was discussed yesterday, and we had the assurance of the medical corps heads that when they call doctors they are going to be used for their professional qualifications.
>
> Mr. Scrivner: I am glad to have that assurance.
>
> Mr. Short: Mr. Chairman, will the gentleman yield?
>
> Mr. Vinson: I yield.
>
> Mr. Short: I am very happy that the gentleman from Kansas asked that question, because we all know there were grave abuses in the last world war. The gentleman from Texas [Mr. Kilday], chairman of the subcommittee, found a lot of doctors sitting out in the desert doing nothing when we had an acute shortage of them back home. They were doing housekeeping work, administrative work, and so forth. We have been assured that that mistake will not be repeated.

Mr, Vinson: The gentleman is correct. (96 Cong. Rec. 13857.)

* * * * * * * *

Mr. Judd: Why should they require 4.5 doctors per thousand men?

Mr. Vinson: Because the people who administer the law and who have charge of the health of the armed services estimate that is what they need. I do not know whether it is right or wrong, and I do not think any of us is in a position to say it is too high or too low. All we want to do is to see that every man that is brought into the medical service performs the duties for which he is brought in, and that the medical force of the armed services is not overstaffed. (*Id.* 13859.)

III. *The Statute's Language and Method of Operation*

That the intent and purpose of the statute was that doctors inducted thereunder be utilized as doctors is shown further by the manner of operation of the statute and its specific language.

The statute by its terms provides for the specific registration of, and induction on the basis of requisitions submitted by the Department of Defense of, "male persons *qualified* in *needed* . . . medical and allied specialist categories." In contrast to all other persons subject to the regular draft, who are inducted for "training and service," doctors inducted under the doctors draft are inducted only for "service." Thus it is perfectly apparent that doctors are to be inducted only when needed to serve as doctors, and that they are to be inducted solely for "service" as doctors. By omitting the word "training" from the authorization for persons inducted under this statute, Congress clearly expressed its intent that doctors would immediately go to work as doctors, and it expressly denied to the armed services any authorization to train doctors inducted under this statute to

serve in any other capacity. With this in mind, Congress expressed its intention that doctors inducted under this statute would become commissioned officers in the Medical Corps of one of the services so that they would then be able, under military regulations, to function as doctors. At the hearings, representatives of the armed services testified that any doctor who had not been commissioned prior to his induction would be commissioned immediately thereafter. This was expressed most clearly in the testimony of Brig. Gen. Robinson before the House Committee.

Mr. Kilday: You propose to commission these men after they have been drafted?

General Robinson: Yes Sir.

Mr. Kilday: Of course you cannot draft him in a commission status?

General Robinson: That is correct.

Mr. Kilday: After he has been drafted, if he waits that long, he will be commissioned. I assume you do not expect to have to use the draft if you get it.

General Robinson: That is correct.

Mr. Kilday: If he does wait to be drafted he would come in as a private?

General Robinson: That is correct.

Mr. Kilday: And he would be immediately tendered a commission?

General Robinson: We would tender a commission to him. It could be done, provided he would accept it.

Mr. Kilday: If he would not accept it he would remain on as an enlisted man?

General Robinson: That is correct.

Mr. Kilday: If he would accept it it would be tendered to him?

General Robinson: Yes, sir. (House Hearings, 7164.)

* * * * * * *

Mr. Kilday: On that point, at what grade will you commission these men?

General Robinson: We have a regulation that pre-

scribes what their grade will be, in accordance with their experience.

Mr. Kilday: What is the lowest grade?

General Robinson: First lieutenant.

Mr. Kilday: First lieutenant?

General Robinson: Yes, sir.

Mr. Kilday: He is going to be drafted. He is going to be immediately tendered a commission, and not as a second lieutenant, but as a first lieutenant.

General Robinson: That is correct. (House Hearings, 7166-7167.)

Members of Congress assumed as a matter of course that doctors drafted under the bill would immediately or shortly after their induction be commissioned in the Medical Corps of one of the armed services. However, Congress did not wish doctors inducted under the bill to receive a special pay of $100 a month, which it had previously provided for commissioned officers in the Medical and Dental Corps of any of the armed services. Title 37 U. S. Code sec. 234. For this reason it inserted in the bill before it section 5, which provides that "No person inducted under the provisions of this act shall be entitled to the benefits of section 234 of this title."[6] By definition, this special pay is granted only to commissioned officers in the Medical and Dental Corps. By denying this special pay to those inducted under the statute, Congress clearly indicated its intention and understanding that doctors inducted under the statute would become commissioned officers in the Medical Corps of one of the armed services. This was clearly stated in the hearings before the House Committee.

Mr. Blandford: May I explain one thing to the committee, which I think should be cleared up with the departments at this point. If you induct a man, you induct him as a private. Now if you induct a doctor as

[6] This provision appears in the U.S. Code as Title 37 sec. 234 b.

a private, is it the intention of the departments to immediately commission that man following his induction?

Mr. Kilday: It was so testified yesterday.

Mr. Blandford: Because the law requires that, in order for a man to be entitled to $100, he must be a commissioned officer and it does not apply to enlisted personnel. (House Hearings, 7223.)

See also H. Rep. 3015 on H.R. 9554, 81st Cong. 2nd Sess., at page 5, and the debate in the Senate, 96 Cong. Rec. 13711, 81st Cong. 2nd Sess.

The purpose of section 5 of the Act was to deny to those who were inducted under the act the extra compensation of $100 a month, Congress believing that this extra compensation should be reserved for those who volunteered. Thus, in the debate in the House, representatives of the Armed Services Committee stated as follows:

> Mr. Vinson: Let me say that we are hoping when this bill passes it will not be necessary to draft any doctors. We hope they will volunteer and join the reserves. We say to you, 'If you volunteer and join the reserves then you get the extra pay of $100' which the Career Compensation Act gives to doctors. (96 Cong. Rec. 13857-8.)
>
> . . . . . .
>
> Mr. Kilday: . . . . The provision of the Career Compensation Act, which grants $100 a month additional pay to doctors who volunteer for service, will be a sufficient incentive together with the provision that if a man waits until he is drafted, he is not going to get that additional compensation. I regard that as completely just and basically necessary in legislation of this type. (96 Cong. Rec. 13862.)

It is perfectly evident, however, that this discrimination in pay was the only discrimination intended by Congress between doctors who volunteer and doctors who are inducted under this act. To interpret the act so as to permit a further

discrimination, and to authorize the armed services to keep inducted doctors in an enlisted status and not employ them as doctors—which is the situation in the present case—is a clear violation of the statute.

Section 3[7] of the statute carries out the same scheme. This section provides in pertinent part as follows:

> ". . . the Secretary of Defense . . . is authorized to transfer between the armed services, within the authorized commissioned strength of the respective services, officers holding commissions in the medical services or corps, including the reserve components thereof . . ."

Enactment of this provision as part of the doctors draft law further evinced the Congressional intent and assumption that all inducted doctors would become commissioned officers.[8]

The fact that under the scheme of the statute and the representations of the military, doctors to be drafted under the statute were to be commissioned at a rank in accordance with their age and experience was an essential consideration in inducing Congress to pass the statute. Congress frankly recognized that the statute was discriminatory in nature and could be justified only in terms of the need for doctors and the fact that doctors to be inducted would be given special privileges. This is seen in the testimony of Dr. Martin of the American Medical Association, quoted supra at page 13, and even more clearly from the following discussions on the floor of the House.

> Mr. Kilday: The fact that this is discriminatory legislation is frankly admitted by the committee. It singles out one profession, and its allied professions,

---

[7] This section appears in the U.S. Code as 5 U.S.C. sec. 171a(g).

[8] The Congressional intent and assumption that all inducted doctors would become commissioned officers is also evident in the House Hearings at pp. 7165, 7167, 7189, and in the Senate Hearings at pp. 40-41.

and provides for their induction into the service where others of their own age group are not inducted. I think it should be stated that the American Medical Association and the other associations affected by the bill have endorsed it. They recognize the need for medical service to the extent they are willing to accept this discriminatory legislation in the public interest.

* * * * * * * *

Mr. Clemente: As an added inducement, is it not a fact when doctors are called into the armed services they are given at least a first lieutenant's grade?

Mr. Kilday: That is correct. I point out the fact that it is discriminatory, because when you come to try to explain the provisions of this bill as other provisions of law may affect other groups, you cannot reason this out on a logical basis, because this is an individual group that is picked out of the population, subjected to special obligations and services, and entitled to certain privileges and advantages. (96 Cong. Rec. 13861.)

The discrimination is heightened by the fact that the petitioner in this case is married and has two children. If he were subject to the provisions of the regular draft, he would be deferred under the provisions of Title 32 C. F. R. 1622.30, which provides for the deferment of ordinary registrants with children. Congress was undoubtedly aware that older men would have family responsibilities to a much greater extent than men under 26. It was also aware that the whole doctors draft would be defeated if deferments were allowed to all men with children. But this problem was obviated in Congress' mind by the fact that the military had assured Congress that doctors would receive a commissioned rank according to their age and experience[9] and thus undoubtedly be able to discharge their family responsibilities. It is inconceivable that, in

[9] E.g.: "General Robinson—We have a regulation by which we commission in grade in accordance with certain provisions, and one of those provisions is the experience and the training that the man has." (House Hearings, 7167).

the absence of such an understanding, Congress would have authorized doctors to be discriminated against because of age, and in addition to be denied deferments because of dependencies which are granted to younger men.

IV. *The Regulations Implementing the Statute*

The regulations of the Selective Service Administration are designed to the same end. A separate set of regulations were promulgated to cover individuals who fall within the scope of this statute. 32 C. F. R. 1650 ff. Persons covered by the statute and required to register by Presidential Proclamation [10] are at the time of registration required to fill out forms entitled "Initial Data for Classification and Commissioning in Medical Services for Medical, Dental and Veterinary Corps." 32 C. F. R. 1650.8(c). This data is to be forwarded to the armed forces for their consideration. Thereafter registrants are not to be inducted unless they have been "found acceptable for service in the armed forces." 32 C. F. R. 1650.40 to 1650.44. Acceptability in the armed services is to be evidenced by a Certificate of Acceptability (D.D. Form No. 62). The regulations provide that this certificate "for each special registrant who is found acceptable for service in the armed forces will show the *specialist category in which the armed forces will accept him for service.*" [11] 32 C. F. R. 1650.30(f). Thus the regulations carrying out the scheme of the statute provide specifically for induction for service in a specialist category.

V. *The Opinion Below*

The court below recognized the intent and purpose of the statute to bring doctors into the armed services to serve as doctors in the following words: (195 F. (2d) at 210-211):

> That the primary purpose of drafting doctors, not otherwise subject to induction, was to supply the armed

[10] See fn. 1, supra.
[11] Emphasis supplied.

forces with needed specialists in this category, is apparent. Certainly, that was the ground on which the bill was justified to Congress by the military. And it also seems apparent that Congress contemplated that inductees under the Act would normally be utilized in their professional capacities. A reading of the debates in Congress is replete with references to such a congressional understanding and desire. See 96 Cong. Rec. 13857, 13859.

Although thus recognizing the clear intent of Congress and the purpose and policy of the statute, the court below chose to ignore this intent and the purpose of the statute on the ground that Congress had not expressly stated the limitation, inherent in the statute, requiring the armed services to utilize doctors drafted under the Doctors Draft Law as doctors. Admittedly there is no language in the statute expressly authorizing the armed services to use doctors in any other capacity. But the court below apparently found such authorization in the fact that the military assured Congress that doctors drafted under the law would be employed as doctors, and that these assurances were necessary to secure enactment of the bill. See 195 F. (2d) at 211, where the court below makes reference to pp. 7164, 7174, and 7176 of the House Hearings, *supra*, and to the debate reported at 96 Cong. Rec. 13857. Thus, from the fact that Congress accepted the assurances of the military that it would use doctors drafted under the law only as doctors, the lower court finds an authorization to the armed services to employ them in some other capacity.

Such a statutory construction is obviously irrational, in the absence of some justification in terms of the purpose and policy of the statute. None is offered, with the exception of the suggestion that the armed services should have power to deal with the situation of an inducted doctor who refuses a commission and thus attempts to escape service

entirely. (195 F. (2d) at 212; see Hearings before House Committee, supra at 7164.) But petitioner clearly does not fall in this category. The suggestion by the court below that the revocation of petitioner's commission by the Air Force prior to his induction puts him in a different category (195 F. (2d) at 212) is clearly inapposite. There is no question that, whatever may have occurred prior to his induction, petitioner did, subsequent to induction, clearly indicate his willingness and desire to accept a commission, complied with all regulations, and did everything that he could to obtain such a commission.

The Court of Appeals, troubled by its own reasoning and the constitutional problems raised thereby, refused to follow its reasoning to the logical conclusion that there was no limitation at all upon the use of doctors drafted under the statute, a conclusion which was urged by respondent and reached by the District Court. The court accordingly found that there was an implied limitation in the statute which restricted the Army to utilizing the petitioner within a "minimal permissible area" not "wholly outside the medical field." (195 F. (2d) at 209.)

But this concession on the part of the court only demonstrates the invalidity of its holding. For it constitutes a recognition by the court that the statute, in authorizing a special draft of doctors, can be justified only if, after induction, the professional skill of the doctor is utilized as such, and that this is a limitation inherent in the statute itself. But working as a laboratory technician or, as Judge Goodman put it, "cleaning sponges or instruments in an operating room" (195 F. (2d) at 213), although perhaps not "wholly outside the medical field," does not require or utilize a doctor's professional skill. Thus the lower court realized that the statute could only be interpreted as imposing a limitation on the manner in which the Army could utilize the petitioner. But it irrationally rejected the

Army. Accordingly, the Army has no authority to keep him in the service and must discharge him.

Conclusion

Since the Army refuses to employ the petitioner as a doctor, it has no authority to keep him under the provisions of Title 50 App. U. S. Code sec. 454(i)(1). Since he does not fall within the provisions of this section of the draft act, his retention in the service is a clear violation of Title 50 App. U. S. Code sec. 454(a), which specifically prohibits the induction of any person after he has passed the twenty-sixth anniversary of his birth.

The judgment of the lower court should be reversed and the case should be remanded to the District Court with instructions that the Army be ordered to discharge the petitioner.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 444

STANLEY J. ORLOFF,

Petitioner,

vs.

COLONEL REX E. WILLOUGHBY, COMMANDANT OF FORT LAWTON, SEATTLE, WASHINGTON

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR PETITIONER

DAVID REIN,
STANLEY FAULKNER,
JOHN CAUGHLAN,
SIEGFRIED HESSE,
Counsel for Petitioner.

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Cases Cited

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limitation which Congress had in mind and which carries out the purpose of the statute, in favor of a meaningless limitation invented by it. The purpose and policy of the statute was to secure needed doctors in the armed services who could not otherwise be obtained under the regular draft. Laboratory technicians can readily be obtained from draftees under the age of twenty-six after approximately two or three months of training (R. 38).

Congress did not authorize, and would not have authorized, a special draft of doctors so that they could be used as laboratory technicians. The construction of the court below produces a perfectly arbitrary result in clear conflict with the statute. Although the only conceivable justification for the statute is to supply the armed services with doctors, the court's construction of the statute permits the armed services to remove a doctor from civilian life, to place him in the army, and then to refuse to utilize his professional skill. Such a construction of the statute does not serve to satisfy the army's need for doctors, and it removes doctors from civilian life where they are sorely needed. Moreover, it subjects the individual doctor to a serious and discriminatory hardship without any corresponding public benefit.

In addition, the court below said that it reads the Act as merely describing "additional classes of men eligible for induction," and that there is nothing to indicate that men drafted under this Act are to be treated differently from those inducted under the regular draft.

Such an assumption ignores not only the purpose of the legislation and the entire legislative history but a whole host of differences. It ignores the fact that persons are to be inducted under this statute only under special Presidential Proclamation and only after special calls for persons in needed specialist categories. It ignores the fact that

persons inducted under this Act are inducted for "service" only, and not for "training and service" as are all other draftees. It ignores the fact that the statute provides that persons inducted thereunder are to be denied the benefits of 37 U. S. Code sec. 234b, a provision which applies only to commissioned officers. It ignores the fact that the same statute provides for the transfer of officers holding commissions in the Medical Corps from one service to another. It ignores the fact that the regulations of the Selective Service Administration promulgated for the implementation of the Act are entirely separate and distinct from the regulations covering other inductees. It ignores the fact that these regulations contemplated that registrants thereunder will be commissioned and will be inducted only if the armed forces have certified that they will be accepted for service in a specialist category.

The opinion below also considered of import the fact that at the hearings before both the House and Senate Committees, representatives of the American Medical Association and American Dental Association proposed an amendment to the bill prohibiting the induction of men who had been refused commissions by the armed forces, but that the bill was not so amended. However, none of the members of the Committees holding hearings ever expressed disagreement with the purpose or intent of this proposed amendment. On the contrary, their expressions at the time indicated general agreement with the representatives of the associations. (Senate Hearings at 26, House Hearings at 7193.) There is no basis either in the hearings or the legislative debates to support the conclusion that the Committees considered the proposals of the two associations and then rejected them as being contrary to their intent and purpose. Quite the contrary is obvious from the hearings and the debates as shown by the excerpts quoted above. The spokes-

men for the Committees reported to the House and the Senate that both the American Medical Association and the American Dental Association had approved the bill,[12] apparently unaware of any conflict of views between themselves and the associations. Congress assumed as a matter of course that doctors would be commissioned, and the representatives of the military assured them that all doctors would be commissioned. The suggestion made by the two associations, if it was considered by the Committees at all, and there is no evidence that it was ever examined, let alone considered,[13] under the circumstances could very well have been ignored because of the congressional belief that the suggestion was purely superfluous and unnecessary. If one must speculate, it was quite possible that Congress failed to enact the proposal of the medical and dental associations because the bill, although concerned primarily with doctors and dentists, did authorize the induction of other "allied specialists." And although it was perfectly clear and unquestioned that doctors and dentists would be commissioned in the medical and dental corps, the exact status of the "allied specialists," such as osteopaths or pharmacists, in the armed services was none too clear.

It was realized by Congress that the proper utilization of these specialists depended upon their being given the rank or status required by Armed Forces regulations. For example, a doctor must be commissioned at least as a 1st Lieutenant. On the other hand, such a requirement does not, or may not, exist for other specialists; and the same or even more stringent requirements may be necessary for still others. Thus, if the Act passed specifically required that

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[12] Senate, 96 Cong. Rec. 13709, House, 96 Cong. Rec. 13855, 13861, 13864.

[13] See statement of Senator Gurney, after conclusion of the testimony of Dr. Adams of the American Dental Association: "In general, I would agree with most of the statements he has made for the association. I have not had time to go over the bill presented carefully, but certainly will do that." (Senate hearings, page 26.)

all *doctors* and *dentists* inducted under it be commissioned, as proposed, then other specialists, in the event of their future induction, would be faced with the similar reasoning as that advanced here: the inclusion of doctors and dentists, as specifically requiring commissioning, excludes others as classes which may be commissioned.

If the rejected legislation had been adopted, then every time that the President found need to induct another category of specialists, a Congressional hearing would be required to determine whether existing military regulations required commissioning for such specialists to be fully utilized. In event such regulations existed, Congress would have to amend the statute.

Such a procedure would have been cumbersome, inefficient, costly, and unnecessary if there was an agreed interpretation of what the word "service" meant in the proposed legislation. And, we submit, there was an agreed interpretation. By "service," it was meant that specialists would serve in their specialist capacities. To guarantee that result, they would, if inducted, be given the necessary rank or status required by the regulations. This is the clear import of the legislative history. The Congress, assured in advance of the administrative interpretation of the word "service," enacted more flexible legislation to meet the requirements of possible future induction of other specialist categories.

Admittedly, this is speculation, but it conforms with the objective facts far more closely than does the speculation of the court below. And as a minimum it serves to prove that the failure of Congress to pass a clarifying amendment to a statute, especially when that failure is accompanied by silence, is always open to two opposing inferences—either that Congress was opposed to the intent of the clarification, or else that it believed the clarification unnecessary because the statute as it stood already covered the problem. The possibility of such mutually conflicting inferences has led

this Court to hold that no inference at all should be drawn. See *Wong Yang Sung* v. *McGrath*, 339 U. S. 33, 47.

VI. *The Canons of Statutory Construction Compel the Interpretation Contended for by Petitioner*

This Court has laid down as standards for statutory construction that statutes should be construed so as to effectuate the clear intent and purpose of the legislature and in accordance with the policy and purpose of the statute, *Vermilya-Brown Co.* v. *Connell*, 335 U. S. 377; *American Fire & Cas. Co.* v. *Finn*, 341 U. S. 6; *United States* v. *C.I.O.*, 335 U. S. 106; so as to avoid arbitrary and unreasonable results, *United States* v. *Katz*, 271 U. S. 354; *United States* v. *American Trucking Associations*, 310 U. S. 534; and so as to avoid constitutional questions, *United States* v. *C.I.O.*, *supra*, *Russian Volunteer Fleet* v. *United States*, 282 U. S. 481.

All of these canons require that the present statute be interpreted so as to require that the petitioner be utilized as a doctor. That was plainly the intent and purpose of Congress and the statute. To construe the statute otherwise, so as to permit the Army to use the petitioner as it sees fit, is clearly arbitrary and unreasonable and raises a serious constitutional question.

VII. *The Statute Should be Construed so as to Avoid its Unconstitutionality*

Congress in enacting this statute recognized its discriminatory nature, but the Committee which drafted the bill justified it on the thesis that the needs of the armed services for doctors required its enactment:

> Mr. Kilday: [speaking for the Committee] The fact that this is discriminatory legislation is frankly admitted by the committee. It singles out one profession, and its allied professions, and provides for their induction into the service where others of their own age

group are not inducted. I think it should be stated that the American Medical Association and the other associations affected by the bill have endorsed it. They recognize the need for medical service to the extent they are willing to accept this discriminatory legislation in the public interest.

* * * * * * * * *

Mr. Wilson of Oklahoma. In view of the needs of the time, is it the position of our committee that this legislation is proper and will be sustained under the constitutional authority of the Congress to raise and maintain an Army?

Mr. Kilday: We so believe. While we regard it as being discriminatory, we think it is clearly within the provision of the Constitution which provides that the Congress shall raise and maintain an Army. You cannot maintain an Army without adequate medical personnel. We had similar legislation during the war period. That was gone into rather thoroughly and I for one on the committee contend it is within the provisions of the Constitution.

Mr. Clemente: Mr. Chairman, will the gentleman yield?

Mr. Kilday: I yield to the gentleman from New York.

Mr. Clemente: As an added inducement, is it not a fact when doctors are called into the armed services they are given at least a first lieutenant's grade?

Mr. Kilday: That is correct. I point out the fact that it is discriminatory, because when you come to try to explain the provisions of this bill as other provisions of law may affect other groups, you cannot reason this out on a logical basis, because this is an individual group that is picked out of the population, subjected to special obligations and services, and entitled to certain privileges and advantages." (96 Cong. Rec. 13861).

Admittedly, a statute drafting doctors for the purpose of utilizing them as doctors would be a reasonable classification and would be sanctioned because of the undoubted

need of the military for doctors. But if the only justification offered is removed, and over-age doctors can be drafted for general use, the statute then becomes arbitrary and unreasonable. A statute so arbitrary and unreasonable would clearly be in violation of the Fifth Amendment. See *Hirabayashi* v. *United States*, 320 U. S. 81, 100. Since the military's need for doctors is the only basis upon which the induction of doctors as a class can be justified, their use for any other purpose is either beyond the scope of the statute, or, if held to be authorized by the statute, would to that extent render the statute unconstitutional.

In *Ex Parte Endo*, 323 U. S. 283, this Court said:

> We have . . . favored that interpretation of legislation which gives it the greater chance of surviving the test of constitutionality . . . We must assume that the Chief Executive and members of Congress, as well as the courts, are sensitive to and respectful of the liberties of the citizen. In interpreting a war-time measure we must assume that their purpose was to allow for the greatest possible accommodation between those liberties and the exigencies of war. We must assume, when asked to find implied powers in a grant of legislative or executive authority, that the law makers intended to place no greater restraint on the citizen than was clearly and unmistakably indicated by the language they used. (At 299-300).
>
> . . . If there is to be the greatest possible accommodation of the liberties of the citizen with this war measure, any such implied power must be narrowly confined to the precise purpose of the evacuation program.
>
> . . . When the power to detain is derived from the power to protect the war effort against espionage and sabotage, detention which has no relationship to that objective is unauthorized. (At 302)

To construe the statute as authorizing the induction of the petitioner for any other purpose than his utilization as

a doctor, would render the statute clearly arbitrary and discriminatory in violation of the Fifth Amendment. It would permit him to be inducted, although otherwise exempt because he was over-age, solely because he was a doctor, but without relation to the Army's need for his services as a doctor. Further, because he was inducted under this statute and not under the regular draft, he would be denied the parents deferment which is granted all other regular inductees. [14]

All this would be authorized without regard to any rational basis in terms of the military's need for his services. Concededly, some reasonable leeway must be afforded the armed services in the administration of the statute. Thus the armed services should have power to deal with the situation of an inducted doctor who refuses a commission. Undoubtedly, one inducted under the statute should not be permitted to escape service entirely by the simple device of refusing to accept a commission. [15] Similarly the armed services could reasonably be allowed a short period of time in order to determine whether or not it wishes to commission a doctor and utilize his services as a doctor, [16] and a short delay in commissioning a doctor because of administrative reasons probably would not be a violation of the statute.

But neither of these situations apply to the petitioner. The petitioner has indicated his willingness to accept a commission and his application for a commission has been rejected. The petitioner clearly falls in the category of one whom the Army does not want as a doctor and whose services as a doctor are presumably not needed by the

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[14] See pp. 20-21, *supra*.

[15] This very situation was anticipated in the hearings before the House Committee. See testimony of Brig. Gen. Robinson, *supra*, page 16.

[16] It should be noted that the Selective Service regulations, discussed supra, p. 21, require that this determination be made before and not after induction.

III. The Government's Treatment of Petitioner Is Arbitrary and Discriminatory, and a Violation of the Fifth Amendment.

If petitioner is being used as a doctor, then he alone of all Army doctors is a private, at a private's pay. Other Army doctors with similar responsibilities and duties are at least first lieutenants; if they have petitioner's age and experience, they are captains.[6]

This discrimination against petitioner is not the withholding from him of a gratuity given to others. He is being denied what was intended as a partial compensation for the discrimination in drafting doctors at an age when persons generally are immune from the draft and without regard to parents' deferments. Thus petitioner is suffering a double discrimination. He is in the Army though over age and a parent, yet he is not receiving the pay and status of every other doctor.

Such a singling out of petitioner is at once harsh and irrational. It is additionally offensive because the punishment is visited on petitioner only because he exercised a right guaranteed by the Federal Constitution. Under these circumstances, we submit, the retention of petitioner as a private deprives him of liberty without due process of law.

The Army has refused to commission petitioner because he claimed his constitutional privilege. The Army refuses to commission other doctors if they do not meet the Army's requirements as to height, color perception, moral character, professional competence, etc. But these others it rejects for service altogether; it does not draft them as privates. Thus it is punishing petitioner only because he

[6] See 32 C.F.R. 561.18(b), setting out the age and experience standards for Army ranks.

had the temerity to claim a privilege guaranteed him by the Constitution.

The government represents that since the Army could not, as it says, commission petitioner because of his assertion of his constitutional privilege, its only reasonable alternative was to keep him in the armed services as a private. But the truly reasonable alternative was the same as if it had refused to commission petitioner for lack of height—not to take him at all.[7] The same situation holds true of the argument that the government's action is dictated by security considerations. Whatever may have impelled the Army to refuse petitioner a commission cannot possibly impel or justify it to keep him in the service at a rank and pay below all other doctors.

That the Army is simply punishing petitioner because he claimed his constitutional privilege is illuminated by the specious nature of the justifications given for denying him a commission. One justification advanced is that to commission loyalty risks would diminish the obedience required from non-commissioned personnel. Yet the government also argues that the petitioner, though a private, also gives orders to nurses and medical technicians who outrank him and obtains their "disciplined obedience" "without question" (Br. pp. 12, 36). Indeed, the government concedes that the obtaining of such obedience is necessary for the proper functioning as a doctor.

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[7] The respondent's contention that one who is denied a commission by the Army, despite his willingness to serve, is on the same footing as one who seeks to evade service by rejecting a commission (Br. pp. 23-24), is obviously without merit, particularly since the function of the draft law is to coerce doctors to apply for commissions. Equally without merit is the fanciful suggestion that some doctors might seek to "escape service by refusing to answer loyalty questions" (Br. 25). Obviously, the Army's discretion in deciding when to tender a commission should not and could not be controlled by a doctor's refusal to answer questions. The Army could always tender him a commission if it felt satisfied with his loyalty and if it wanted him in spite of his dishonesty.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 444

STANLEY J. ORLOFF,

Petitioner,

vs.

COLONEL REX E. WILLOUGHBY, COMMANDANT OF FORT LAWTON, SEATTLE, WASHINGTON

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR PETITIONER

The government's brief (pp. 16-17) confesses error on the issues presently before the court: whether a doctor drafted under the Doctors Draft Act must be utilized as a doctor, and whether, if the Army refuses so to utilize him, he must be released.[1] On the basis of the government's confession, and the record before the Court, the decision below should

[1] Although the government frankly admits that under the statute the petitioner must be utilized as a doctor, it suggests (p. 17, fn. 6) that the Court of Appeals decision may have been correct in that the use of the petitioner as a laboratory technician might be considered to be a utilization of his services as a doctor. Of course, the record indicates quite clearly that this assignment as a laboratory technician did not utilize peti-

be reversed and remanded with directions that the petitioner be released from the Army.

The government, however, suggests that this Court should consider the case on the basis of the petitioner's present Army assignment, which was made subsequent to the decision of the Court of Appeals. The government thus raises these problems: (1) Whether petitioner is now being utilized as a doctor, and (2) Whether the Doctors Draft Law requires that all doctors drafted thereunder be offered a commission by the armed services.

In our view, the entire record, including the additional data presented by the government, demonstrates that the petitioner is not now being utilized as a doctor, and in fact cannot be so utilized so long as the Army refuses to commission him. It is also our position that the Doctors Draft Law requires that all doctors drafted thereunder be offered a commission by the armed services. Accordingly, we assert, the petitioner's present assignment should not alter the result, since the petitioner should still be ordered released from the Army.[2]

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tioner's training as a doctor (R. 34-39), and certainly the Court of Appeals did not think so since it rested its decision on the ground that it was not necessary to utilize petitioner as a doctor. Although the government does not seriously argue that petitioner's designation as a laboratory technician was a utilization of the petitioner as a doctor, its suggestion to that effect does demonstrate that the government has an unusual view of the function and role of a doctor.

[2] Even if the Army were in fact utilizing the petitioner as a doctor in full compliance with the statute, it would still be necessary to reverse the decision below. That decision is in any event erroneous and should be corrected. Moreover, a defendant's voluntary granting, pending litigation, of a continuing relief requested by a plaintiff does not resolve the dispute or make the controversy moot. *National Labor Rel. Bd.* v. *Pennsylvania G. Lines*, 303 U.S. 261; see *J. I. Case Co.* v. *National Labor Relations Board*, 321 U.S. 332, 334; *Federal Trade Comm.* v. *Goodyear Tire & Rubber Co.*, 304 U.S. 257, 260; *Walling* v. *Helmerich & Payne, Inc.*, 323 U.S. 37, 43. In the absence of an effective restraint, the Army would be free, under the rule of the lower courts, to utilize the petitioner virtually without restriction.

I. The Petitioner Is Not Presently Being Utilized as a Doctor.

The Government suggests that the Court should at this stage, on the basis of certain alleged undisputed facts presented by the government outside of the record, make a finding that the petitioner is at the present time being utilized as a doctor. We do not agree with the government as to which facts are undisputed. Moreover, in our view, those facts which actually are undisputed clearly demonstrate that the petitioner is not being utilized as a doctor and that under Army regulations and procedures he cannot be so utilized so long as the Army refuses to grant him a commission.

The facts which actually are undisputed are these:

1. The petitioner is a private in the Army.

2. He was originally classified as a laboratory technician. Subsequently, after the decision in the Court of Appeals and following the issuance of a stay by Mr. Justice Douglas, he was assigned, still as a private, to Madigan Army Hospital with a designation of "psychiatrist" and with the duties as set out in Appendix B of the government's brief. He was, however, informed that he may not do the following things (see petitioner's affidavit attached to his Reply to the government's opposition to certiorari and attached hereto as Appendix A):

a Prescribe or order any drugs, including sedatives.

b. Administer or supervise any of the "shock" or "convulsive" therapies, which constitute the single, most effective, widely used, and generally accepted method of treatment of psychiatric patients.

c. Give injections of any kind, including the intravenous administration of such drugs as pentothal or amytal. This

latter procedure is often an exceedingly important therapeutic aid.

d. Perform any surgical procedures and particularly the spinal puncture, which is frequently imperative in the practice of psychiatry.

e. Be a member of the Medical Board, for which all medical corps officers are eligible, which board diagnoses and recommends the disposition of patients.

f. Be a member of the Therapy Board, which board decides which patients shall have shock therapy.[3]

In dispute is whether or not under Army regulations and practice a non-commissioned person can function as a doctor. But the respondent's contention that Army regulation and practice are no barrier to the utilization of a private as a doctor rests solely on the naked assertion in the respondent's brief. The contention is admittedly in conflict with the stipulation made by the respondent in the court below (See Govt. Br. p. 20). It conflicts also with the testimony of the representative of the Surgeon General before the House Committee considering the doctor's draft statute (see our main brief pp. 16-18). It is in conflict with the statements made by representatives of the Army to the petitioner, that he could not be utilized as a doctor unless he was commissioned (R. 2, 3, 8, 9, 12, 14). It is also in conflict with the respondent's admission in its brief that at least since 1947, every doctor in the Army was a commissioned officer until the petitioner's case arose

[3] The government contends that the restrictions imposed on petitioner with regard to the administering of shock and convulsive therapy and acting as a member of the Therapy Board are restrictions normally placed on other psychiatrists (Br. pp. 13, 34, 35). The petitioner disputes this. He contends that he is the only "doctor" assigned to psychiatry who is not permitted to administer shock or convulsive therapies or be a member of the Therapy Board. He specifically denies, as contended by respondent, that these functions are limited to the Chief and Assistant Chief of the Service.

(Govt. Br. pp. 19-20). In short it is perfectly apparent that the first time it ever occurred to anyone that anyone not a commissioned officer can function as an Army doctor was when it was raised by the Solicitor General in this Court in opposition to the petition for certiorari. We suggest also that the Solicitor General's view is not only novel, but that it is also in violent conflict with reality.

It is evident that the government is seeking to deny incontrovertible facts in order to rescue its case. When the petitioner was inducted in the Army, it never occurred to anyone that he could be utilized as a doctor in the absence of a commission. When the case was tried in the lower court, the government admitted the obvious, that a commission was indispensable to functioning as a doctor in the armed services. This honest admission of the obvious compelled the government to urge as a proposition of law that the Doctors Draft Law did not require that the petitioner be utilized as a doctor. The government now belatedly finds this proposition of law to be untenable in this Court, and it so confesses. No longer confident of its ability to fudge the law, the government now seeks to fudge the facts by repudiating the stipulation of obvious facts which it made in the lower court.

Of course, it is not merely an accident that the Army shows an unbroken history of requiring that all doctors hold commissions. Such a policy is made inevitable by the nature of Army organization and discipline. To permit doctors to serve as such in the absence of a commission would require not merely a change in regulations, but a complete revolution in Army organization and discipline. To function as a doctor in the armed services, an individual must have authority to requisition supplies and equipment, to prescribe drugs and treatment, to order hospitalization or other treatment for patients, to take men off duty, to

give them limited duty, or to make other disposition of a case. A doctor must also have authority over those who should be his subordinates, *i.e.,* nurses, who hold the rank of at least a second lieutenant, and medical corpsmen. He must also have authority over his patients. In civilian life, these are incidents which flow without question from a doctor's professional standing and from his license to practice medicine. In the military service, such authority only accompanies rank as a commissioned officer.

The respondent's assertion that the petitioner has the same authority over nurses and medical technicians that he would have as an officer (Br. pp. 12, 36) is palpably inconsistent with the realities of military life, assuming as it does that in the Army, authority is independent of rank.

Indeed, in a later portion of its brief, the respondent recognizes the obvious—that in the Army, authority exists only in relation to rank. In urging that the Army was justified in refusing the petitioner a commission because it had some question as to his "loyalty," the government says (Br, p. 25): "The Army could not expect to obtain the necessary disciplined obedience of the non-commissioned personnel if there were any doubt as to the loyalty of their officers." If the petitioner cannot be commissioned because his and other officers' orders would not then be respected, he certainly will not command greater obedience by virtue of being a private. Yet the government concedes that the ability to give orders to nurses and medical technicians, which is lacking in the petitioner, is an essential prerequisite to the proper functioning as a doctor.

The government asserts that it is the general policy of the Army to "determine the manner in which each doctor can best exercise . . . [his] qualifications and the restrictions which have been placed upon the petitioner are based upon an "evaluation of his overall qualifications"

(Br. pp. 12, 33-34). The government thus intimates that the restrictions placed upon the petitioner are akin to those by which the Army would refrain from assigning a general practitioner to psychiatry or a pediatrician to surgery. This suggestion is sheer casuistry. The restrictions placed upon the petitioner have no relation to his professional qualifications and are not placed upon commissioned doctors. In other words, in its "evaluation of . . . . [petitioner's] overall qualifications," the Army has taken into account the fact that the petitioner lacks the "qualification" of being a commissioned officer. Because he lacks commissioned status, the Army has placed upon the petitioner restrictions which effectively prevent his being utilized as a doctor. It is absurd even to suggest that one is engaged in the practice of medicine when he is prohibited from prescribing drugs or sedatives [4] and from having any voice in determining the treatment to be accorded his patients.[5]

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[4] The government asserts (Br. pp. 3, 34-35) that the prohibition against petitioner's prescribing drugs or sedatives stems from security reasons, on the ground that if petitioner could administer drugs and sedatives he would be able to elicit information from his patients. This assertion is completely inconsistent with the memorandum of petitioner's commanding officer that petitioner has full authority to elicit histories or any other information from his patients in the course of psychiatric examination and treatment (Br. p. 31). Moreover the suggestion that the petitioner cannot be permitted freely to elicit information from his patients confirms petitioner's contention that in his present status he cannot properly function as a psychiatrist. (See petitioner's affidavit, infra.) The restriction against prescribing drugs or sedatives is not placed upon commissioned officers, and, in any event, whatever the reason may be for the prohibition, the fact remains that a "doctor" who cannot prescribe drugs or sedatives is not a doctor.

[5] The government argues that petitioner's inability to be a member of the Medical Board, which diagnoses and recommends the disposition of patients, "is not a restriction on his professional duties," since "the Medical Boards are administrative in character and perform duties relating to the internal management of the Army" (Br. pp. 13, 35). This state-

The government's position amounts to an assertion that the petitioner is being utilized as a "doctor" as much as any enlisted man can be. If this be so, nevertheless, it is apparent from the undisputed facts that this utilization is not enough to enable the petitioner to practice as a doctor.

II. The Doctor's Draft Law Requires That Doctors Drafted Thereunder Be Tendered a Commission.

In fact, then, a person cannot function as a doctor in the Army so long as he lacks commissioned status. But assuming the impossible that petitioner is at once a private and a doctor, there is raised the problem whether doctors inducted under the Doctors Draft must be offered a commission. The legislative history of the statute, set out in our main brief, indicates that that was clearly the congressional understanding and intent, and a prerequisite to passage. Congress was assured by the military that this would be done, and these assurances were used by the committee spokesmen to persuade Congress that the statute's discriminatory treatment of doctors was ameliorated thereby. (See our main brief pp. 19-21.) Further, Congress clearly indicated that the only discrimination in rank and pay which it intended between doctors who volunteer and doctors who were drafted was to deny to the latter an extra compensation of $100 a month. (See our main brief, pp. 17-19.)

The government is wrong in contending that Congress showed a contrary intent by failing to include in the legislation provisions proposed by the American Medical Association and the American Dental Association which expressly stated that all doctors and dentists be commissioned

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ment is disingenuously unsound. It is clear that only doctors sit on Medical Boards, that all doctors by virtue of being doctors are eligible to sit on such boards, and that diagnosing and recommending the disposition of patients is essential to the functioning as a doctor.

before acceptance in the armed services (Br. pp. 21, 22). As noted in our main brief (p. 26), the spokesmen for the congressional committees reported to both the Senate and the House that these two associations had indorsed the bill as presented to the floor. These statements are understandable only on the basis that the spokesmen considered that the bill as presented satisfied the associations' wishes. Indeed, they could hardly have thought otherwise in view of the military's invariable practice and the assurances given them by the armed services that persons drafted under the legislation would be commissioned. Under these circumstances, the omission of the provisions offered by the professional associations was not a rejection of their purpose but a determination that they were completely superfluous and unnecessary to achieve the objective desired. (See our main brief, pp. 25-28.)

The testimony of General Robinson, relied on by respondent (Br. p. 22), does not support the respondent's position, but, on the contrary, tends to contradict it. This testimony, which is set out in our main brief at pp. 16-17, shows that although a person drafted under the act would remain a private if he refused a commission, the Army assured Congress that it would always, without exception, tender a commission. General Robinson's testimony thus does not document the statement that "Congress did not intend to require that the Armed forces either commission or discharge drafted doctors" (Govt. Br. pp. 22-23). It shows, instead that a draftee would not be commissioned only if he affirmatively rejected a commission. That is certainly not the situation here.

The government also sees a problem in the fact that commissioned officers have access to certain classified information, "which could not in any practical way be kept from a particular officer" (Br. p. 25). But there is no reason why the petitioner should see classified information that has no relation to his duties,[8] and it would obviously be far more practical to keep classified information from the petitioner, than to have him function as a doctor in a private's rating.

If security considerations in fact presented any problem whatsoever, it would not be in the rank which the petitioner may hold, but in the nature of the duties, responsibilities and authority which may be assigned to the petitioner. But the government contends that the petitioner, despite the Army's doubts as to his loyalty, has been and can be assigned all the duties, responsibilities and authority necessary to permit him to function as a doctor in the armed services. We contend that this is not so as long as the petitioner is not commissioned. But if we take the government's contention at its face value, its position amounts to the following: security considerations do not prevent the granting to the petitioner of the duties, responsibilities and authority which are accorded doctors in the Army, but security considerations prevent his receiving the rank and pay of other doctors.

If petitioner is given the authority, responsibilities and duties of a doctor, it is perfectly apparent that the denial to him of the rank and pay that goes with this authority, responsibilities and duties, has nothing to do with security, but is simply a deliberately punitive measure taken against the petitioner solely because he exercised his constitutional rights in answering the Army's loyalty questionnaire.

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[8] It should be noted in this connection that doctors, although commissioned officers, are by statute expressly denied authority in line matters. 10 U.S. Code sec. 82.

Conclusion

Upon the basis of the record made in the lower court, the Doctors Draft Law requires that the decision below be reversed and remanded with directions that the petitioner be released from the Army. The additional data presented by the government with respect to the petitioner's present assignment should not alter this result, for this additional data, plus the record as a whole, show that the petitioner is not presently being utilized as a doctor and cannot be so utilized so long as the Army refuses to grant him a commission. In addition, the Doctors Draft Law requires that doctors drafted thereunder be tendered a commission. Since the Army has made it perfectly clear that it has not and will not tender a commission to the petitioner, the Army should be ordered to discharge him.

Respectfully submitted,

DAVID REIN,
STANLEY FAULKNER,
JOHN CAUGHLAN,
SIEGFRIED HESSE,
Counsel for Petitioner.

APPENDIX A

IN THE SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1952

No. 86 Misc.

STANLEY J. ORLOFF, *Petitioner*

vs.

REX E. WILLOUGHBY, Colonel, United States Army, Commanding Officer, Fort Lawton, Washington

On Motion for Leave to Proceed in Forma Pauperis and on Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

AFFIDAVIT OF PETITIONER IN SUPPORT OF REPLY TO RESPONDENT'S MEMORANDUM IN OPPOSITION TO THE GRANTING OF PETITION FOR A WRIT OF CERTIORARI

STATE OF WASHINGTON,
County of King, ss:

Stanley J. Orloff, being first duly sworn on oath, deposes and says:

I am the petitioner above named, and make this affidavit in opposition to the contentions made by respondent in his memorandum in opposition to the granting of the petition for a writ of certiorari.

I am now on detached service from the Casual Enlisted Station at Fort Lawton, Seattle, Washington, to the 9952 TSU-SGO, Madigan Army Hospital, Tacoma, Washington. I am a Private E-2, and a member of the Enlisted Personnel Detachment at Madigan Hospital.

The letter of Colonel John J. Marren, attached to respondent's memorandum, states what duties I am allowed to perform in my present status; it does not set forth the the important functions that I am not able to perform.

Because of the lack of a commission, my own chief, Colonel John J. Marren, Chief of Neuro-psychiatry, and

Colonel Emery S. Alling, Commanding Officer of Madigan Army Hospital, have informed me that I may not do the following:

(1) Prescribe or order any drugs (including sedatives).

(2) Administer or supervise any of the "Shock" or "Convulsive" therapies which constitute the single most effective, widely used, and generally accepted method of treatment of psychiatric patients.

(3) Give injections of any kind including the administration of such drugs as Pentothal or Amytal, intravenously. This latter procedure is frequently an exceedingly important therapeutic aid.

(4) Perform any surgical procedures and particularly the spinal puncture, which is frequently imperative in the practice of psychiatry.

(5) Be a member of the Medical Board (for which all Medical Corps officers are eligible) which board diagnoses and recommends the disposition of patients.

(6) Be a member of the Therapy Board (for which all Medical Corps Officers assigned to the psychiatric unit are eligible) which board decides which patients shall have shock therapy.

Respondent on page 5 of his memorandum, asserts that "At the present time . . . petitioner is being used as a doctor, in the very field of his special training, psychiatry." This assertion is not true.

The above specified functions which I can not perform, are, in fact, the very ones which distinguish the psychiatrist, who must be a physician, from the so called "lay therapist," who also engages in the treatment of mental disorders.

Therefore, one who is prohibited the use of medical techniques in the treatment of psychiatric disorders can not be properly said to be ". . . used as a doctor in the very field of his special training, psychiatry. Further, the inability to perform these distinctly medical functions renders my medical training, medical degree, and the bulk of my specialty training completely useless to the Army."

The peculiar overlapping of the field of psychiatry and

psychology makes it possible to disguise this important fact relating to the present refusal of the Army to utilize my medical training and capacities, for only psychiatry (which I can not practice) requires medical training. Had I been engaged in the practice of general medicine, a specialty such as surgery, or indeed, any other recognized medical specialty except psychiatry, my inability to prescribe drugs, perform spinal taps, do even minor surgical procedures, etc. . , would make any appearance that I am practicing as a doctor impossible. The reality, however, is still the same. I am not practicing medicine.

Moreover, being a private affects adversely the main type of therapeutic procedure in which I am allowed to engage, namely, psychotherapy. The most vital part of this method of treatment is the relationship between the patient and the therapist. In civilian life one's professional status confers a certain amount of authority, confidence and respect so necessary in effective treatment. In the Army (where medical officers are addressed by rank only), the role of a therapist who is a private, is a particularly difficult one. Patients are inclined to be disconcerted by the inevitable revelation, and consequently the confidence so essential to effective practice is hard to establish.

Finally, there is the factor of the relationship to nurses, medical corpsmen and a variety of medical personnel, which is complicated by this eccentric status.

(S.) STANLEY J. ORLOFF,

Subscribed to and sworn to before me this 22nd day of September, 1952.

(S.) JOHN CAUGHLAN,
Notary Public for the State of Washington, residing in Seattle.

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No. 444

In the Supreme Court of the United States

OCTOBER TERM, 1952

STANLEY J. ORLOFF, PETITIONER

v.

COLONEL REX E. WILLOUGHBY, COMMANDANT, FORT LAWTON, SEATTLE, WASHINGTON

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT

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In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 444

STANLEY J. ORLOFF, PETITIONER

v.

COLONEL REX E. WILLOUGHBY, COMMANDANT, FORT LAWTON, SEATTLE, WASHINGTON

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the Court of Appeals (R. 44–49) is reported at 195 F. 2d 209. The opinion of the District Court (R. 42–43) is reported at 104 F. Supp. 14.

JURISDICTION

The judgment of the Court of Appeals was entered on March 13, 1952 (R. 49), and a petition for rehearing was denied on April 17, 1952 (R. 49–50). The petition for a writ of certiorari was filed on July 14, 1952 and was granted on Novem-

ber 10, 1952 (R. 51). The jurisdiction of this Court rests on 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether a doctor inducted into the Army under the Doctors' Draft Law may be utilized by the Army as a medical doctor without being granted a commission.

2. Whether petitioner is being utilized as a doctor.

STATUTE AND PRESIDENTIAL PROCLAMATION INVOLVED

Public Law 779, 81st Cong., 2d sess., 64 Stat. 826, as amended by Public Law 51, 82d Cong., 1st sess., 65 Stat. 88, 50 U. S. C. App., Supp. V, 454 (i), provides in pertinent part:

> (1) * * * the President is authorized to require special registration of and, on the basis of requisitions submitted by the Department of Defense and approved by him, to make special calls for male persons qualified in needed—
>
> (A) medical and allied specialist categories who have not yet reached the age of fifty at the time of registration, and
>
> (B) dental and allied specialist categories who have not yet reached the age of fifty at the time of registration.
>
> * * * * *
>
> (2) In registering and inducting persons pursuant to paragraph (1) of this subsection, the President shall, to the extent that

he considers practicable and desirable, register and induct in the following order of priority:

First. Those persons who participated as students in the Army specialized training program or similar programs administered by the Navy, and those persons who were deferred from service during World War II for the purpose of pursuing a course of instruction leading to education in one of the categories referred to in clauses (A) and (B) of paragraph (1) of this subsection, who have had less than ninety days of active duty in the Army, the Air Force, the Navy, the Marine Corps, the Coast Guard, or the Public Health Service subsequent to the completion of or release from the program or course of instruction (exclusive of the time spent in postgraduate training).

Presidential Proclamation 2906, October 6, 1950, 15 F. Reg. 6845, 6847, as amended by Presidential Proclamation No. 2915, December 28, 1950, 15 F. Reg. 9419, provides in pertinent part:

1. Every male person who participated as a student in the Army specialized training program or any similar program administered by the Navy, or was deferred from service during World War II for the purpose of pursuing a course of instruction leading to education in a medical, dental, or allied specialist category, and has had less than twenty-one months of active duty

in the Army, the Air Force, the Navy, the Marine Corps, the Coast Guard, or the Public Health Service subsequent to the completion of, or release from, such program or course of instruction (exclusive of time spent in postgraduate training), and who, on the day or any of the days hereinafter fixed for his registration (a) shall have received from any school, college, university, or similar institution of learning, one or more of the degrees of bachelor of medicine, doctor of medicine, doctor of dental surgery, doctor of dental medicine, doctor of veterinary surgery, and doctor of veterinary medicine, (b) is within any of the several States of the United States, the District of Columbia, the Territory of Alaska, the Territory of Hawaii, Puerto Rico, or the Virgin Islands, (c) is not a member of any reserve component of the armed forces of the United States, and (d) shall not have attained the fiftieth anniversary of the day of his birth is required to and shall on that day or any of those days present himself for and submit to registration before a duly designated registration official or selective service local board having jurisdiction in the area in which he has his permanent home or in which he may happen to be on that day or any of those days.

2. The special registration of the male persons required to submit to registration by paragraph numbered 1 hereof shall take place in the several States of the United

States, the District of Columbia, the Territories of Alaska and Hawaii, Puerto Rico, and the Virgin Islands between the hours of 8:00 a. m. and 5:00 p. m. on the day or days hereinafter designated for their registration, as follows:

(a) Persons who shall have received any of the degrees above referred to on or before October 16, 1950, shall be registered on Monday, the 16th day of October, 1950.

STATEMENT

A. THE STATUS OF THE CASE BEFORE THE COURT OF APPEALS

In late 1942, petitioner, who was then 18 years old and had completed two years of pre-medical training, applied for and was granted a commission as a Second Lieutenant in the Medical Administrative Corps of the Army (Resp. Ex. 3, pp. 46–47). A few months later, on June 5, 1943, he resigned his commission and enlisted in the Army Specialized Training Program as a medical student (Resp. Ex. 3, p. 38). From that time until he was separated from the Army, on August 14, 1945, he attended medical school at Government expense (Resp. Ex. 3, p. 100). On May 15, 1946, he graduated from medical school (R. 5, 10–11; Resp. Ex. 3, p. 28). Thereafter, he specialized in psychiatry (R. 11).

In 1951, petitioner became liable to induction under the provisions of Public Law 779, 81st

Cong., 2d sess., 64 Stat. 826,[1] 50 U. S. C. App., Supp. V, 454 (i), *supra*, pp. 2–3, commonly called the Doctors' Draft Law, which authorizes the President to require special registration of, and to make special calls for, men trained in medical and allied specialist categories who have not reached the age of 50 (R. 2–3). He applied for and was granted a commission as Captain in the Medical Corps, United States Air Force Reserve, but was discharged a few days later because he refused to execute the loyalty certificate required of commissioned officers (R. 11; Resp. Ex. 3, pp. 5, 8, 15), which, *inter alia*, requested information as to membership in or association with organizations designated by the Attorney General as totalitarian, fascist, communist, subversive, or which advocated force and violence to obtain a change in government or to deny certain individuals their constitutional rights (Resp. Ex. 3, pp. 23–27). At that time, he gave as his reasons for refusing to execute the loyalty certificate that, to quote him (Resp. Ex. 3, p. 15), "as a matter of conscience, I object to filling out the loyalty certificate because it involves an inquisition into my personal beliefs and views. Moreover, the inquiry into organizational affiliations employs the principle of guilt by association, to which I am vigorously opposed. Further, it is my under-

[1] The termination date of the Act was extended to July 1, 1953, by Public Law 51, 82d Cong., 1st sess., 65 Stat. 88.

standing that all the organizations were listed by the Attorney General without notice or hearing which has caused the Supreme Court to invalidate it."

Thereafter, on July 26, 1951, petitioner was inducted into the Army under the provisions of the Doctors' Draft Law. Like all persons drafted into the Army, he was inducted as a private.[2] (R. 5–6.)

After the induction and reception processing, petitioner was transferred to the Medical Replacement Training Center at Fort Sam Houston, Texas, for sixteen weeks of basic military orientation training (R. 6). Upon completion of this training, he was assigned a "potential military occupation specialty" as a medical laboratory technician, and, on November 30, 1951, was ordered to report to Fort Lawton, Washington, Personnel Center, by December 19, 1951, subsequently extended to December 29, for transfer to the Far East Command (R. 6; Ex. 5).

In the interim, petitioner was given leave, during which time he went to Washington, D. C. (R. 13). There, after consulting high ranking officers of the Army Medical Service, on December

[2] Because Public Law 779 was designed not only to grant authority to draft doctors but also and primarily to induce doctors who are about to be drafted into voluntarily entering the Armed Forces medical reserves, petitioner was one of the first persons inducted under that Act. As of November 1952, 22 doctors and dentists had been drafted under the Act (see *infra*, p. 20).

10, 1951, he applied for a commission in that service (R. 6). In connection with this application, he did file the required loyalty certificate but did not fully supply the requested information with respect to the listed organizations. He stated (Resp. Ex. 2, p. 10): "I have attended public meetings of the Civil Rights Congress and the National Council of American-Soviet Friendship. In 1943, I co-authored a radio play for the latter organization. Over a period of 7½ months I attended classes at the Jefferson School of Social Sciences (ending in the Spring of 1950). With respect to any other organizations contained on the annexed list I am compelled to claim my Federal Constitutional Privilege. However, I have never considered myself an organizational member of any of the aforesaid." In reply to a question, "Are you now or have you ever been a member of the Communist Party, U. S. A. or any Communist Organization", petitioner wrote, "Federal constitutional privilege is claimed" (Resp. Ex. 2, p. 22). Petitioner's application for a commission was pending at the time of the hearing in the District Court. We are informed that it has since been denied.

On December 29, 1951, petitioner reported as ordered to the Enlisted Replacement Center, Fort Lawton, Seattle, Washington (R. 6). On that day (R. 15), he filed the instant petition for a writ of habeas corpus, seeking his discharge from

the Army on the ground that, since he had been inducted under the special draft law relating to doctors, the Army must either use him as a doctor or discharge him, and that since he had been designated as a medical laboratory technician, he was not being so employed (R. 1–3).[3] An order to show cause was issued (R. 3–4) and respondent filed a return (R. 4–7) and an answer to the petition (R. 7–10), taking the position that Public Law 779 did not require the Army to use doctors inducted thereunder as doctors. After a hearing, held on January 9, 1952, the District Court discharged the order to show cause and dismissed the petition (R. 42–43), holding "that the law itself does not require that the person, or doctor, drafted under the Act must serve as a doctor" (R. 42).

On appeal, the Court of Appeals for the Ninth Circuit affirmed, and a petition for a rehearing was denied on April 17, 1952. Judge Goodman at first concurred in the affirmance, but later, on the petition for rehearing, dissented from the majority holding (R. 44–50; 195 F. 2d 209). The majority of the court found it unnecessary to pass on the question whether doctors drafted under the special Doctors' Draft Law could be utilized entirely outside the medical field (R. 46), since peti-

[3] On December 13, 1951, petitioner had filed a petition for a writ of habeas corpus in the District Court for the District of Columbia, naming high Defense Department officials as respondents (R. 6). This petition was dismissed for lack of jurisdiction, 101 F. Supp. 750.

tioner's assignment as a medical laboratory technician represented employment "in a type of work for which his medical training renders him peculiarly adaptable" (R. 46). In view of that fact, the majority concluded that petitioner was lawfully in the custody of the Army.

B. THE PRESENT STATUS OF THE CASE

On March 26, 1952, petitioner applied to the Court of Appeals for a stay. After it was explained to the court that the Army had assigned petitioner to a "detached service status", whereby he remained subject to the orders of the Commanding Officer of Fort Lawton, who could recall and produce him in response to a court order from any place to which he might be assigned, the Court of Appeals denied the application. On application to Mr. Justice Douglas, a stay was originally granted. Subsequently, on May 3, 1952, on motion of the respondent, the stay was modified to provide that "so long as petitioner retains his 'detached service status,' he may be assigned anywhere within the United States." *Orloff* v. *Willoughby*, 72 S. Ct. 998.

Immediately thereafter, on May 6, 1952, petitioner was designated a psychiatrist performing psychiatric duties and was transferred in detached duty status to Madigan Army Hospital, Tacoma, Washington, for duty as a psychiatrist performing psychiatric duties (Appendix A, *infra*, p. 30).

In opposition to the petition for certiorari, the government called attention to petitioner's assignment, since it appeared to render moot the sole issue raised by the petition, i. e., whether a person inducted into the Army under the Doctors' Draft Law must be utilized as a doctor.[4]

In reply, petitioner alleged that the authority which inheres in practice as a doctor, in military service "only accompanies rank as a commissioned officer." He attached an affidavit listing the conditions which had been imposed upon him and alleged that because of these limitations he was not being utilized as a doctor. The Surgeon General in reply explained the limitations imposed on petitioner and the reasons therefor.

Petitioner is assigned to Madigan hospital as a psychiatrist performing psychiatric duties. He "elicits histories from patients, performs physical, psychiatric and neurological examinations, establishes diagnoses and carries out such psychotherapy as is indicated in the management of cases assigned to him. He also writes up charts, procures laboratory and psychological tests and social service reports, as are indicated in the diagnoses and treatment of his patients." He "per-

[4] It is proper to bring to the Court's attention facts dehors the record which demonstrate that a case has become moot. Robertson and Kirkham, *Jurisdiction of the Supreme Court of the United States* (Wolfson and Kurland Ed. 1951), § 275, and cases there cited; Stern and Gressman, *Supreme Court Practice* (1950), pp. 339–340.

forms consultations requested by other departments of the hospital, issues medical certificates when indicated, presents cases for action by the medical board and to conferences conducted by the psychiatric consultant." He attends all staff conferences, including conferences conducted by the consultants. In addition, petitioner has been given the opportunity to evaluate the validity of a psychiatric test upon which he had been working prior to his induction into the Military Service. (Appendix B, *infra*, pp. 31–32.)

While on duty, petitioner is dressed in the normal duty uniform worn by doctors in the Army, a white medical coat without insignia of rank. He is addressed by his associates, nurses, technicians and patients as "Doctor." In the course of his professional treatment of patients, he gives orders to nurses and medical technicians which are carried out without question. (Appendix C, *infra*, p. 36.)

Restrictions have been placed upon petitioner based upon "evaluation of his overall qualifications and not affected by the fact of his enlisted status." These limitations have been imposed by the commanding officer in accordance with his duty to "determine the manner in which each doctor can best exercise these qualifications in a team approach to discharging the hospital's responsibilities." (Appendix C, *infra*, pp. 33–34.)

The only restriction that results from petitioner's lack of commissioned status is that he is not

permitted to act as a member of Medical Boards since Army regulations provide that only commissioned officers may be assigned as members of such boards. That, however, is not a restriction on his professional duties. The Medical Boards are administrative in character and perform duties relating to the internal management of the Army. (Appendix C, *infra*, p. 35.)

The only restriction upon petitioner which is uncommon is that he is precluded from prescribing drugs and sedatives and administering injections. This restriction has been imposed for security reasons since "Security information, which could not otherwise be obtained, may be elicited from patients while under the influence of sedatives and other drugs." (Appendix C, *infra*, pp. 34–35.)

The remaining restrictions imposed on petitioner are normally placed on other psychiatrists assigned to duty at the hospital. Thus, only the Chief and Assistant Chief of the Neuropsychiatric Service are authorized to administer shock and convulsive therapy. Petitioner is not permitted to act as a member of the Therapy Board because the board is composed of the chiefs of the several services, and there are many commissioned medical service officers who are not members of such Board. (Appendix C, *infra*, pp. 34–35.)

The Surgeon General has stated, "If Dr. Orloff were relieved from duty, it would be necessary to replace him with another Psychiatrist" (Appendix C, *infra*, pp. 36–37).

SUMMARY OF ARGUMENT

On the issue presented by the petition for certiorari—whether a physician drafted under the Doctors' Draft Law must be utilized in his professional capacity—the government concedes that he must be so used. The narrower issue presented by the decision of the Court of Appeals, as to whether assignment as a medical laboratory technician is a sufficient utilization of professional medical skills, is now moot, for the Surgeon General has assigned petitioner to duty as a doctor and states that he will be so used during his period of service.

I

However, petitioner has suggested that no doctor can properly be used as such without a commission. In this contention, he is in error. Although, until the enactment of Public Law 779, it had been the practice of the Armed Forces not to accept those doctors and dentists who did not possess the qualifications of an officer, there is nothing in Army regulations which prohibits the use of non-officer doctors to perform medical services. The legislative history of the Doctors' Draft Law shows that Congress rejected proposals to require the Armed Forces either to commission or reject drafted doctors or dentists, even though Congress was made aware of the fact that occasions might arise where commissions could not be

tendered or where tendered commissions might be rejected.

Petitioner was one of the first doctors to be inducted under the Doctors' Draft Law, since he had received part of his medical education at government expense and had not thereafter been in active service with the Armed Forces. When he claimed the privilege against self-incrimination as to loyalty questions, the Army was clearly justified in refusing to grant him a commission. An officer's loyalty must not be open to question. On the other hand, to refuse to use his services would have violated at least the spirit of the Doctors' Draft Law, for, if petitioner were discharged, some other doctor would have to be drafted in his place. The only fair and practical alternative was to do what the Army has done, i. e., use his professional services without granting him a commission.

II

Although the issue of whether petitioner's present assignment does in fact represent a utilization of his services as a doctor was not decided by the courts below, we believe that the facts are sufficiently clear so that this Court may finally dispose of the cause without adopting petitioner's suggestion that the matter be remanded for further hearing on this issue.

Petitioner is performing duties which only a doctor can perform. He is addressed and treated

as a doctor. The Surgeon General has stated that, if petitioner were relieved from duty, it would be necessary to replace him with another psychiatrist. He is thus clearly being utilized as a doctor.

His objections to the restrictions imposed upon him raise no issue for judicial determination. A court cannot decide matters of internal management of a hospital, and particularly of an army hospital. All doctors in the Army are subject to restrictions which do not pertain to doctors in civilian life.

ARGUMENT

INTRODUCTORY ANALYSIS AND DISCUSSION OF ISSUES

The question presented by the petition for certiorari is as follows:

> Whether the petitioner who is outside the age limits for the regular draft, but was drafted solely because he is a doctor, pursuant to a statute which authorizes the induction of doctors, may be retained in the Army even though the Army refuses to use him as a doctor.[5]

On this issue there is no disagreement between petitioner and the Government. Despite the position taken by the attorneys for respondent below, the Government now concedes that doctors in-

[5] The second question raised the question of constitutionality if the first were answered in the affirmative.

ducted under the Doctors' Draft Law must be utilized in their professional capacity. Since the purpose of the statute was to subject to the draft special classes of persons over 26 who would not be inducted except for the need for their professional qualifications, it was clearly intended that when drafted such persons should be used professionally.

There is not presently involved even the narrower issue presented by the decision of the Court of Appeals, i. e., whether use of a physician as a medical laboratory technician represents a sufficient use of a physician's specialized training to be deemed a utilization of his services as a physician.[6] Petitioner is now assigned to duty as a psychiatrist performing psychiatric services. We have been assured by the Surgeon General that

[6] Actually it has always been the policy of the Army to utilize professional personnel in the performance of appropriate professional duties commensurate with their professional training and experience (see Statement of the Surgeon General, Res. Ex. 4). But petitioner presented a new situation, and specific policy as to how to utilize the professional services of non-officer doctors had not been established. Petitioner's designation as a laboratory technician was designed to utilize his services in his professional field. Obviously, there is considerable laboratory work which demands medical training and medical skills. Since petitioner began this action before he entered on any duties, he was hardly in a position to assert that his medical skills were not being utilized. The policy now is to use such personnel in the same manner as commissioned personnel. See letter from the Surgeon General to the Judge Advocate General, annexed as Appendix D, *infra*, pp. 37–38.

petitioner will continue to be utilized as a doctor, although not necessarily at his present post, since, like all other persons in the Army, he will be subject to transfer in accordance with the needs of the Army. The Surgeon General, in a letter to the Judge Advocate General set forth as Appendix D, *infra,* pp. 37–38, has stated that it is the policy of his office to utilize the professional training of all non-officer personnel inducted under the Doctors' Draft Act. This policy "is identical to the policy followed in the case of physicians, dentists and veterinarians who enter the active military service in a commissioned status."

As the case comes before this Court, therefore, it presents issues not presented to and not determined by the Court of Appeals and not raised in the petition for certiorari. In the District Court and in the Court of Appeals, petitioner did not claim that Public Law 779 required that he be commissioned; his attorney stated in the District Court that "there is no question involved in this case, so far as the Petitioner is concerned, as to the Army's granting him a commission or not granting him a commission." (R. 21.) Nevertheless, in opposition to the government's contention that the issue presented by the petition for certiorari had become moot, and in support of his claim that he is not in fact now being utilized as a doctor, petitioner has suggested that, in the Army, no physician can properly act as such unless he has the authority which stems from the status of an

officer (see Statement, *supra*, p. 11). As we see it, therefore, the only legal issue which the cause in its present posture presents for decision is this new issue as to whether a doctor may be utilized as such in the Army without a commission. We discuss this in Point I, *infra*, pp. 19–26. There is also a factual question raised by the reply to the opposition to certiorari as to whether petitioner's present assignment represents a utilization of his services as a physician in view of the restrictions imposed on him. That is an issue which petitioner suggests should properly be remanded for consideration by the District Court after a hearing. While we have no objection to such a disposition of the cause on this issue, we believe that on the basis of undisputed facts, the situation is sufficiently clear so that this Court may fully dispose of the cause on the papers before it. See Point II, *infra*, pp. 26–29.

I

A PHYSICIAN MAY BE UTILIZED IN HIS PROFESSIONAL CAPACITY IN THE ARMY WITHOUT A COMMISSION

Prior to the enactment of Public Law 779, the Medical Services of the Army and Navy had obtained all of their doctors by voluntary enlistment.[7] Since 1847,[8] it had been the practice of

[7] Even those secured through the Armed Forces Specialized Training Program were obtained by voluntary enlistment in that program.

[8] The Army was authorized to commission doctors by the Act of February 11, 1847, 9 Stat. 123, 124–125.

the Armed Forces Medical Services to commission doctors and dentists, and not to accept those doctors and dentists who did not possess the qualifications of an officer. Nevertheless, contrary to the statement of respondent's attorneys in the court below, there is nothing in Army regulations which prohibits the Army from using non-officer doctors to perform medical services (Appendix D, *infra*, pp. 37–38).

Public Law 779 was designed both to grant authority to draft doctors and dentists and to induce doctors and dentists selected for induction to join the Armed Forces Medical Services Reserves, by providing that any doctor or dentist who voluntarily joined such reserves would receive $100 additional pay per month (Hearings on H. R. 9554 before House Committee on Armed Services, 81st Cong., 2d sess., pp. 7172–7173, 7220–7223).[9] When Congress was considering proposals to draft doctors, dentists and allied specialist categories, the Defense Department stated that it intended to

[9] Because of this feature, it has been unnecessary to draft many doctors or dentists under that law. By October 13, 1952, 6,049 doctors and dentists had been obtained under the influence of the Doctors' Draft Law (Appendix E, *infra*, pp. 38–39), while by November 20, 1952, we are informed, only 22 had been inducted. Even those inducted who are qualified to become officers are, after their basic military training, offered commissions in the reserves. To date there are only three doctors and dentists in the Armed Forces who are disqualified for a commission, and have not or will not be commissioned; all of these are, however, being utilized professionally.

tender commissions to drafted doctors and dentists (Hearings before House Committee on Armed Services, 81st Cong., 2d sess., on H. R. 9554, pp. 7164, 7166–7167, 7223). Congress, however, rejected proposals to require the Department to do so, despite the fact that it was made fully aware that occasions might arise where commissions could not be tendered or where tendered commissions might be rejected.

The bill was not extensively debated in either House of Congress but was carefully considered by the appropriate committee of both Houses of Congress. Both the American Medical Association and the American Dental Association, in oral and written testimony by their representatives accompanied by a proposed draft of an amendment, recommended to the committees of both houses that the bill be amended to provide that any person selected for induction who applies for a commission should be deferred for induction for 60 days or until his application is rejected, whichever is earlier, and to provide "That no person shall be inducted after he is rejected for a commission unless he falls within the age group" of 18 to 26 (Hearings before the House Committee on Armed Services, on H. R. 9554, 81st Cong., 2d sess., pp. 7191, 7199, 7199–7201, 7202, 7203, 7208; Hearings before Subcommittee of Senate Committee on Armed Services, 81st Cong., 2d sess., on S. 4029, pp. 11, 19, 21, 22, 23–24). Dr. Adams, President of the American Dental Association, pointed out

to both committees that the bill "does not provide a mechanism to require the commissioning of at least the medical and dental personnel who might be inducted under its terms" (House Hearings, *supra*, pp. 7199, 7202; Senate Hearings, *supra*, p. 21). In recommending the amendment, he stated that "the association has in mind such requirements of the Armed Forces as those which require an officer to have a minimum height of five feet four inches whereas an individual is qualified * * * as an enlisted man if nature has granted him but five feet two inches of height," and the requirement that an officer have proper "color perception" (House Hearings, *supra*, pp. 7200, 7208; Senate Hearings, *supra*, p. 24).

Despite these recommendations, nowhere in the legislative history of the Act was there any suggestion by any member of Congress that the bill should require the armed services either to commission or reject doctors and dentists,[10] and no such provision was adopted.

Congress was also made aware that some doctors might refuse commissions and thus would have to serve in a non-officer status. General Robinson, representing the Surgeon General of the Army, testified that a doctor would be drafted as a private and that, if he did not accept the commission tendered him, "he would remain on

[10] Congress also rejected a recommendation by the American Osteopathic Association to amend the bill to require the commissioning of osteopathic doctors drafted under the Act. When this recommendation was made by representatives of

as an enlisted man" (House Hearings, *supra*, p. 7164). Thus, it is clear that Congress did not intend to require that the Armed Forces either commission or discharge drafted doctors.

Petitioner argues, however, that his services as a doctor cannot be fully utilized by the Army unless he is commissioned. This same argument was made to Congress by the American Dental Association and the American Osteopathic Association (House Hearings, *supra*, pp. 7202, 7208, 7214; Senate Hearings, *supra*, pp. 24, 65). Yet, as we have shown, Congress did not require that persons drafted under the special draft law be commissioned. Apparently Congress thought that the Armed Forces could adjust their systems when presented with non-officer medical personnel, so that their professional services could be utilized. That has now been done.

It seems too clear to merit discussion that a person liable for service under the law should not be

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the American Osteopathic Association (House Hearings, *supra*, pp. 7214, 7215; Senate Hearings, *supra*, p. 63), they pointed out to the committees that the Army had never commissioned osteopathic doctors (House Hearings, *supra*, p. 7213); Senate Hearings, *supra*, pp. 60–65) and contended that their services as osteopathic doctors could be utilized to maximum extent only if they were commissioned (House Hearings, *supra*, p. 7214; Senate Hearings, *supra*, p. 65). Nevertheless, no member of Congress suggested that the bill be amended to require the Armed Services to commission drafted osteopathic doctors, although the Chairman of the House Armed Services Committee stated that "Certainly everybody is going to use them where they are qualified to be used" (House Hearings, *supra*, p. 7215).

able to escape duties imposed on others of his class by the simple expedient of refusing a commission. It seems equally clear that such a person should not be allowed to escape such duties because he has been found not to have the qualifications necessary for officer status.

Petitioner received much of his medical education at government expense, and, although he was only 27 years old when he was inducted, he had never served in the Armed Forces except for a short period before and while he was attending medical school. He thus fell within the first group to be inducted under the Doctors' Draft Law. When, in applying for a commission after his induction, petitioner claimed the privilege of self-incrimination with respect to loyalty questions, three alternatives were presented. The Army could shut its eyes to the issue of loyalty and commission petitioner as an officer; it could refuse to use petitioner's services although he was of the class first liable to induction; or it could do what it has done, i. e., use his services without granting him a commission.

The Army was clearly justified in not adopting the first alternative. As we have shown, despite the previous practice in the Army, nothing in the Doctors' Draft Law or in Army regulations requires that doctors be commissioned. And certainly the Army could properly feel that a person who had first refused to answer questions as to his loyalty and who had subsequently claimed the

privilege against self-incrimination on loyalty questions is not fit officer material. An officer's loyalty must not be open to question. The Army could not expect to obtain the necessary disciplined obedience of the non-commissioned personnel if there were any doubt as to the loyalty of their officers. Moreover, by simple virtue of his rank, a commissioned officer has access to certain classified information, available to all officers, which could not in any practical way be kept from a particular officer.

On the other hand, to refuse to use petitioner's services would have violated at least the spirit of the Doctors' Draft Law. If petitioner's services were not utilized, some other doctor would have to be drafted in his place, perhaps one who had not received his education at government expense or who had already served in the Armed Forces. Moreover, if a person could escape service by refusing to answer loyalty questions, a loophole for evasion would be opened. Presumably, very few loyal doctors would try to avoid service on such a ground. Nevertheless, this law, which necessarily imposes an unusual burden upon a limited professional group, must not be so administered as to permit even a few unscrupulous doctors to evade the military service which Congress, in the interest of national defense, has found it necessary to require.

The course adopted by the Army, of using the professional services of those properly drafted

under the Doctors' Draft Law, but denying commissions to those found unfit for officer status, accords with both the spirit and the letter of the law. Petitioner is therefore not entitled to be released from the Army.

II

PETITIONER IS BEING UTILIZED AS A DOCTOR

It is undisputed that petitioner is presently assigned to duty as a psychiatrist performing psychiatric duties.[11] He is addressed and treated as a doctor. He performs duties which only a doctor can perform. The Surgeon General has stated that if petitioner "were relieved from duty, it would be necessary to replace him with another Psychiatrist" (App. C, *infra*, pp. 36–37).

Admittedly, as a member of the medical staff of a large military hospital, petitioner does not enjoy the complete freedom of action of a doctor in private practice. Even in civilian life, a doctor attached to a clinic or hospital is a member of a medical team to which the member doctors

[11] The facts as to petitioner's present duties are taken from documents already filed with this Court in connection with the question of mootness of the issue presented by the petition for a writ of certiorari. Thus, Appendices A and B, *infra*, pp. 30–32, were annexed to our memorandum in opposition to certiorari, and Appendix C, *infra*, pp. 33–37 to our reply to petitioner's reply to our opposition. These facts were not denied in petitioner's affidavit attached to his reply. The additional matters set forth in his affidavit are discussed in the text.

contribute various specialized skills and in which group decisions are both routine and beneficial. In a military hospital, moreover, there is a concentration of ultimate authority and responsibility in the higher ranking medical officers. Thus, while petitioner complains that he is not allowed to administer shock and convulsive therapy, the fact is that at Madigan Army Hospital only the Chief and Assistant Chief of the Neuropsychiatric Service are authorized to administer such treatments (App. C, *infra*, pp. 34–35).

The only restriction which has been placed upon petitioner because of his lack of a commission is that he may not serve as a member of Medical Boards. These Boards, which under Army Regulations must be composed of commissioned officers, perform administrative functions, such as determining physical disability as a basis for retirement or discharge. Clearly, the fact that petitioner does not participate in such decisions in no way precludes full utilization of his training and abilities in essential medical work.

The only restriction upon petitioner's functioning as a doctor which is unusual in the case of a doctor with his training and experience is that for security reasons he is not permitted to prescribe drugs and sedatives. Classified information may be elicited from patients under the influence of sedatives and other drugs. Petitioner's assertion of the privilege against self-

incrimination when he was asked to state whether he was a past or present member of the Communist Party amply justifies such a restriction. *American Communications Ass'n* v. *Douds*, 339 U. S. 382.

It is to be noted that the Army has assigned petitioner to work in his chosen specialty of psychiatry. Clearly, nothing in the Doctors' Draft Law requires the armed forces to assign a doctor to the particular type of medical work which he prefers or as to which he considers himself particularly well qualified. Rather, he is to be assigned according to the needs of the service as determined by his military superiors. Thus, if petitioner had been assigned to make relatively routine physical examinations, as are many doctors in the armed forces, it would be clear that he was being utilized as a doctor; at the same time, it would hardly be suggested that he could dictate his reassignment to more specialized work which he regards himself as competent to perform. It is clear that in his present assignment, even with the restrictions of which he complains, a far more effective use is being made of petitioner's experience and training than if he were assigned to relatively routine work, customarily performed by doctors, in which such restrictions would be irrelevant.

Petitioner's sole complaint at this stage of the litigation seems to be that without an officer's commission he will be so lacking in authority and

prestige that he cannot effectively function as a doctor in the Army. We believe that the Surgeon General's statements as to petitioner's duties and authority (App. C, *infra*, pp. 33–37) show the contrary and are conclusive as to the Army's ability effectively to utilize petitioner's professional skills.

In the light of these considerations, petitioner's demand that the courts overturn his assignment as not sufficiently "medical" in nature would require the judiciary to undertake an unprecedented and unwarranted supervision of the internal management of the armed forces.

CONCLUSION

In view of these undisputed facts, we believe that this Court can dispose of the case by itself determining whether the Army's utilization of petitioner is consistent with the purposes of the Doctors' Draft Law. In the alternative, the case can be remanded to the District Court for a determination as to whether petitioner is being utilized as a doctor.

WALTER J. CUMMINGS, JR.,
Solicitor General.

CHARLES B. MURRAY,
Assistant Attorney General.

ROBERT S. ERDAHL,
BEATRICE ROSENBERG,
MURRY LEE RANDALL,
Attorneys.

JANUARY 1953.

APPENDIX A

HEADQUARTERS FORT LAWTON

FORT LAWTON, WASHINGTON, *6 May 1952*

Special Orders
Number 117

EXTRACT

148. PVT-2 STANLEY J. ORLOFF US18152566, Co E, 6217 Enl Repl Cen, this sta, is designated Primary MOS 0564 (Psychiatrist performing psychiatric duties) UP SR615-25-15 and TWX TAG DA 326017 dtd 5 May 52.

149. PVT-2 STANLEY J. ORLOFF US-18152566 MOS 0564, Co E, 6217 Enl Repl Cen, this sta is reld fr atch'd 6013 ASU US Army Hosp Det this sta and placed on DS with 9952 TSU Madigan Army Hospital, Tacoma, Wash eff 7 May 52 for an indefinite period, for duty as Psychiatrist performing psychiatric duties. No per Diem Auth. AUTH: TWX TAG DA 326017 dtd 5 May 52.

BY ORDER OF COLONEL WILLOUGHBY:

OFFICIAL
C. C. LA RIVIERE (S)
WOJG, USA
Ass't Adjutant

HAROLD HOLDEN
Captain, Arty
Adjutant

True Copy:
(S) John J. Marren
JOHN J. MARREN
Colonel, MC
Chief, NP Service

APPENDIX B

MADIGAN ARMY HOSPITAL
TACOMA, WASHINGTON, *17 July 1952.*

MEDFM–NP

Subject: Duties of Dr. Stanley J. Orloff.

Thru: *Commanding Officer,*
Madigan Army Hospital.

To: THE SURGEON GENERAL,
Department of the Army,
Washington 25, D. C.,
Attn: Personnel Office.

1. Dr. Stanley Orloff reported for duty on the Neuropsychiatric Service 8 May 1952 under the provisions of Special Orders No. 117, Headquarters Fort Lawton, Washington, dated 6 May 1952, a true copy of which is attached hereto. He expressed an interest in the treatment of psychotic patients and was accordingly assigned to the Closed Ward Section of the Neuropsychiatric Service. In this capacity he elicits histories from patients, performs physical, psychiatric and neurological examinations, establishes diagnoses and carries out such psychotherapy as is indicated in the management of cases assigned to him. He also writes up charts, procures laboratory and psychological tests and social service reports, as are indicated in the diagnoses and treatment of his patients. He further completes the medical charts, including final diagnoses. The clinical records of his cases, as in the case of all doctors on the Staff, are approved for clearance and final disposition of the patient by either

the Chief of Service or Assistant Chief of Service who initials the 55A sheet of the clinical record before forwarding to the Machine, Records, Registration and Tabulating Section for processing.

2. Dr. Orloff performs consultations requested by other departments of the hospital, issues medical certificates when indicated, presents cases for action by the medical board and to conferences conducted by the psychiatric consultant who visits our hospital twice monthly. He attends all Staff Conferences, including conferences conducted by all our consultants. He is also in the process of supervising the preparation of a projective test for rapid differential diagnosis between organic and functional conditions, psychoses and neuroses. He had been working on this test prior to induction into the Military Service and has been given the opportunity to further statistically evaluate the validity of this test during his present assignment.

3. Dr. Orloff seems to be reasonably content in his present situation and is cooperative with the rest of our Staff in the performance of his duties.

(Sgd.) JOHN J. MARREN,
Colonel, MC,
Chief, NP Service.

Incl: Cpy SO No. 117.

APPENDIX C

DEPARTMENT OF THE ARMY
OFFICE OF THE SURGEON GENERAL

WASHINGTON 25, D. C., *21 October 1952.*

In Reply Refer To
MEDCM-B 201 Orloff, Stanley J. (EM)

ROBERT L. STERN, Esq.,
Acting Solicitor General,
Department of Justice,
Washington 25, D. C.

DEAR MR. SOLICITOR GENERAL: Reference is made to the affidavit of Dr. Stanley J. Orloff, attached to his Reply to the Respondent's Opposition to the Granting of the Petition for a Writ of Certiorari in the Supreme Court of the United States. This affidavit concerns his duties as a doctor assigned to the Neuropsychiatric Service, Madigan Army Hospital, Tacoma, Washington, and the limitations upon the scope of these duties to which exception is taken. I should like to comment on the reasons for such restrictions as exist, and at the same time present some of the considerations facing the commander of an Army hospital in the proper use of personnel assigned to him.

It is the responsibility of the commanding officer of an Army hospital to evaluate all qualifications of individual doctors assigned to his command, evaluation to include the degree of excellence in the abilities possessed. He must further determine the manner in which each doctor can best exercise these qualifications in a team approach to discharging the hospital's responsi-

bilities. The functions and duties which have been assigned to Dr. Orloff by the Commanding Officer of Madigan Army Hospital are based upon evaluation of his overall qualifications and not affected by the fact of his enlisted status. As a result of a personal interview with Colonel Emery E. Alling, Commanding Officer, Madigan Army Hospital, and an investigation made by this office, the following facts have been obtained concerning Dr. Orloff.

Dr. Orloff reported for duty with the Neuropsychiatric Service of Madigan Army Hospital, on 8 May 1952, pursuant to orders assigning him in an enlisted status for duty as a Psychiatrist. His orders, copy attached, direct his assignment and use as a Psychiatrist, in which position he was placed and has been used since the reporting date. The Commanding Officer had knowledge that Dr. Orloff did not possess all the qualifications necessary for a commission in the Medical Corps Reserve. After careful evaluation of all of Dr. Orloff's qualifications, a preliminary to definitive assignment of any doctor coming to this hospital, appropriate duties and responsibilities as a Psychiatrist were assigned to him and he became subject to certain limitations in activities outside these assigned duties. These limitations and the reasons therefor are as follows:

(1) Dr. Orloff is not permitted to prescribe drugs and sedatives for security reasons. Security information, which could not otherwise be obtained, may be elicited from patients while under the influence of sedatives and other drugs.

(2) Dr. Orloff is not permitted to perform

shock and convulsive therapy. Only the Chief and Assistant Chief of the Neuropsychiatric Service are authorized to administer such therapy. Other doctors of medicine serving in commissioned status at Madigan Army Hospital are not permitted to administer shock and convulsive therapy.

(3) He is not permitted to administer injections because of the general restriction on the use of drugs, injection being merely a mode of administration.

(4) Dr. Orloff is not permitted to perform spinal punctures because his Chief of Service, in distributing duties to doctors of medicine on his staff economically using abilities available to him, did not assign this duty.

(5) Dr. Orloff is not permitted to act as a member of Medical Boards. Army Regulations provide that only commissioned officers be assigned as members of Medical Boards. Such Boards are administrative in character and perform duties relating to the internal management of the Army.

(6) Dr. Orloff is not permitted to act as a member of the Therapy Board. This Board is composed of the Chiefs of the several Services. There are many commissioned Medical Corps officers on duty at Madigan who are not members of the Therapy Board.

Dr. Orloff has been on duty approximately five months at Madigan Army Hospital where he is occupying a position established for a Psychiatrist. His duties occupy his full time as a Psychiatrist performing the functions enumerated in letter dated 17 July 1952 from Chief of

the Neuropsychiatric Service, Madigan Army Hospital, to this office, inclosed herewith.

While on duty, Dr. Orloff is dressed in the normal duty uniform worn by doctors in the Army. This uniform consists of a white medical coat or operating gown without insignia of rank. He is addressed by his associates, by the nurses, the medical technicians, and the patients as "Doctor." In the course of his professional treatment of patients, he gives orders to nurses and medical technicians which are carried out without question.

In view of the responsibilities of a hospital commander to his patients and to the Army, few doctors are permitted unlimited practice within a hospital, and most of them are subject to some restrictions. In a large Army hospital, and this is equally true of large civilian hospitals, efficient use of physicians with differing kinds and degrees of ability requires a careful division of labor which often channels individual effort in highly specialized ways. The inevitable corollary to specialization is a nominal restriction on the activities of individuals within a given group. Doctors in the Army are constantly under study with a view of periodic re-evaluation directed to maximum employment of their skills and the development of individual potentiality better meeting military requirements.

The retrictions imposed on Dr. Orloff by the hospital commander were based on his evaluation of Orloff's total qualifications. It is desired to reemphasize that Dr. Orloff has been and is being utilized at Madigan Army Hospital as a doctor of medicine (Psychiatrist). If Dr. Orloff were

relieved from duty, it would be necessary to replace him with another Psychiatrist.

Sincerely,

(S) George E. Armstrong,
GEORGE E. ARMSTRONG,
Major General, The Surgeon General.

2 Incls.:
1. Cpy ltr fr Madigan Army Hospital to TSG dtd 17 Jul 52
2. Cpy SO 117, dtd 6 May 52

APPENDIX D

UTILIZATION OF AMEDS PROFESSIONAL PERSONNEL INDUCTED INTO THE ARMY

MEDCM-P

SURGEON GENERAL'S OFFICE

DEPARTMENT OF THE ARMY

THE JUDGE ADVOCATE GENERAL

14 JULY 1952.

Maj McKenzie/lfw 63632

1. Reference is made to your inquiry of 11 July 1952 regarding the policy of The Surgeon General with respect to the utilization of physicians, dentists and veterinarians who are inducted into the Army under the provisions of subsection 4 (i), Universal Military Training and Service Act, as amended.

2. Upon the completion of reception processing, the personnel referred to above are transferred to the Medical Replacement Training Center, Camp Pickett, Virginia for the purpose of re-

ceiving orientation regarding their newly acquired military status in particular and the functions and operations of the Army in general. This orientation period is considered to be a basic requirement for all soldiers regardless of their civilian training and experience.

3. Upon completion of the orientation period referred to above, it is the policy of The Surgeon General to utilize the professional personnel in question in the performance of appropriate professional duties commensurate with their professional training and experience. This policy of personnel utilization is identical to the policy followed in the case of physicians, dentists and veterinarians who enter the active military service in a commissioned status.

S. B. HAYS,
Major General, M. C.,
Acting The Surgeon General.

APPENDIX E

DEPARTMENT OF THE ARMY

OFFICE OF THE SURGEON GENERAL

WASHINGTON 25, D. C., *13 October 1952.*

In Reply Refer To
MEDCL 210.1

Mr. ROBERT L. STERN,
Acting Solicitor General,
Department of Justice,
Washington, D. C.

DEAR MR. STERN: The number of medical and dental officers procured to date by the influence

of Public Law 779, 81st Congress, totals 6,049, of which 3,989 are doctors and 2,060 are dentists. There are two enlisted doctors and dentists now serving in the Army, of which Stanley J. Orloff is one, the other being a dentist. This office is advised that the Department of the Navy also has one enlisted person who is a dentist. To date, the three military services have drafted, as enlisted men, fourteen professionally qualified persons. All of these are now, or will be, commissioned, with the exception of the above mentioned persons.

Sincerely,

(S) Silas B. Hays,

SILAS B. HAYS,
Major General, M. C.
Acting The Surgeon General.

U. S. GOVERNMENT PRINTING OFFICE: 1950

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SUPREME COURT, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952.

No. 86-Misc.

STANLEY J. ORLOFF,

Petitioner,

vs.

COLONEL REX E. WILLOUGHBY,
Commandant of Fort Lawton,
Seattle, Washington.

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF *AMICI CURIAE*.

ROYAL W. FRANCE,
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952.

No. 86-Misc.

STANLEY J. ORLOFF,

Petitioner,

vs.

COLONEL REX E. WILLOUGHBY,
Commandant of Fort Lawton,
Seattle, Washington.

Motion for Leave to File Brief as *Amici Curiae*.

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The undersigned, as counsel for the Committee To Prevent Abuse of The Doctors' Draft Act, respectfully moves this Honorable Court for permission to file the accompanying brief as *amici curiae*. Permission to file this brief has not been sought from the Solicitor General.

The Committee to Prevent Abuse of the Doctors' Draft Act came into existence when the facts in this case first came to the attention of members of the medical and dental professions. It is interested in the proper administration of the so-called "Doctors' Draft Law", 50 App. U. S. Code, sec. 454(i)(1).

The members of the committee are of the opinion that the exercise of a constitutional privilege should not deprive a doctor of his status and a commission. When he is drafted into military service as a private he cannot be discharged until his period of service has been completed. His status is not a voluntary one. He did not seek military service, the law compels him to serve, therefore he should not be penalized to the point where he is deprived of his qualification as a doctor and his right to a commission.

Wherefore, it is respectfully requested that this Honorable Court grant this motion for leave to file the annexed brief *amici curiae*.

ROYAL W. FRANCE,
Attorney for *Amici Curiae*,
104 East 40th Street,
Borough of Manhattan,
City of New York.

Supreme Court of the United States

OCTOBER TERM, 1952.

STANLEY J. ORLOFF,

Petitioner,

vs.

COLONEL REX E. WILLOUGHBY,
Commandant of Fort Lawton,
Seattle, Washington.

Motion of Various Physicians and Dentists for Leave to File this Brief as Friends of the Court.

We, the undersigned physicians and dentists, through our attorney, Royal W. France, respectfully ask leave of the Court to file this brief as friends of the Court in support of the physicians above named.

Brief *Amici Curiae.*

It is with the deepest concern that the subscribing members of the medical and dental professions have learned of the decision of the United States Court of Appeals for the Ninth Circuit in this case. We are not so much concerned with the fate of Dr. Orloff as an individual for few, if any of us, know him personally. Neither do we concern ourselves with his political beliefs or memberships which may have led him to refuse to sign a required statement as to his connection in any manner with any of the listed organiza-

The case of the petitioner here clearly points up the danger to the professions and to the nation which has led the undersigned to subscribe to this brief. He is a trained psychiatrist and before induction held a most responsible position in a leading instiution for the mentally ill. The training for such work is long and arduous. The need for competent psychiatrists is great. Statistics show that more beds in American hospitals are given over to the mentally ill than to any other class of patients. There is a dire shortage of competent men in this field which does not attract many doctors to it. If such a man is drafted into the army and not used in his professional capacity there is a double loss. Not only do the armed forces and the civilians who are in need of his services lose them but another doctor has to be drafted into the Armed Forces to fill the place that he might occupy.

It is no answer to say that as a private he can use his skill, to a limited extent. Especially in his special field he is being wasted and his right to perform his professional function denied. Modern psychiatry is dependent on shock treatments and the administration of drugs and use of procedures which are denied to him. Moreover, in this field as much or more than in any other, the confidence of the patient in his doctor is of vital importance. Even if he were allowed, in a limited way, to treat patients the fact that he is a private when it is well known that doctors are entitled to commissions would seriously hamper his usefulness.

We believe that the intent of the "Doctors Draft Law" was to conserve medical manpower. The construction given to the law by the Court below wastes it. We do not believe that it was the intent of Congress to pass legislation discriminating against professionally trained doctors whose services are vital to national defense and national welfare.

The construction given to the law by the Court below discriminates in a way that endangers the security of all doctors. If one doctor can be drafted into the army as a private when he is beyond the usual draft age on the theory that he is a doctor and falls in to that special classification and then not used as a doctor with a commission to which he is entitled because of his classification, what doctor can feel secure in his own status? The present decision thus does more than visit an injustice on the individual before the Court. The impact will be felt by all those in the medical and dental services who are conscious of the dignity, rights and importance to the nation of their respective professions.

In these circumstances we, the undersigned,* affirm it to be our considered judgment that the case of the petitioner herein is one of vital national importance and that the decision below either incorrectly construes the "Doctors' Draft Law" or that the law is discriminatory and violates the Fifth Amendment to the Constitution of the United States. As members of the medical and dental professions we express the hope that the petition for Writ of Certiorari herein will be granted.

Respectfully submitted,

/s/ Royal W. France,
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tions designated by the Attorney General pursuant to Executive Order 9835. We do not consider these beliefs or memberships, whatever they may be, relevant. Whether a physician can serve properly in the armed forces in his professional capacity involves not his political beliefs but his professional competence. He is not a security risk in the sense, let us say, of an atomic scientist.

We are concerned, however, with what seems to be a frankly discriminatory and punitive interpretation of the draft laws as applied to doctors in this case. If the decision appealed from is allowed to stand not only will doctors not be given a preferred status as a result of their special skill and training but on the contrary will be subject to the draft far beyond the age fixed for non-professional people with no assurance whatever that their services will be utilized in their professional capacities. It is natural, therefore, that we are troubled at this threat to our professions as a whole.

At the time when the so-called "Doctor Draft Law" was pending before Congress, the representatives of our professional associations at the congressional hearings recognized that some exception had to be made in respect to the members of our professions from the rule that persons over the age of 26 could not be drafted. Few doctors would have been available below the age of 26 because of the long period of training required to qualify the members of these professions for their duties. As professional people, therefore, we were willing to accept the fact that we should be subject to service at a much later age than the ordinary draftee on assurance that we would be drafted only as needed and used in our professional capacities. Otherwise, we would have been placing ourselves in a position where we could be discriminated against by being drafted into the armed forces and still used in circumstances and for purposes for which our professional skills were not required

We were given such assurances at the hearings of the Committees both of the Senate and the House of Representatives.

The discriminatory nature of the legislation and the fact that in view of this discrimination care should be taken that doctors not absolutely essential should not be called up was recognized by Chairman Vinson in a statement to Dr. Walter B. Martin, in which he said:

> "There are no two ways in the world about that. *We should not put them in there just to be putting them in there to do something that has no direct bearing on the medical care of the men or their physical welfare*" (Emphasis supplied) House hearing, page 7193.

Similar assurances were given in the debates in Congress on the bill.

Apparently the Court below was troubled by the conclusion to which its logic led and the constitutional question that such obvious discrimination against doctors as allowing them to be drafted beyond the usual draft age, and tried to avoid it because Dr. Orloff has now been assigned to duties not "wholly outside the medical field." But this is illogical. If the Court below recognizes that the statute in authorizing a special draft of doctors beyond an age when others can be drafted can be justified only if, after induction, the doctor is utilized as such and that this limitation is inherent in the statute itself it follows then the Armed Forces are bound by the limitation. Putting a trained psychiatrist to work as a laboratory technician or as Judge Goodman put it "cleaning sponges or instruments in an operating room" or doing any other kind of work for which a civilian could be readily trained is not a utilization of his professional skill.

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